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UNITED STATES
CIRCUIT COURTS OF APPEALS
REPORTS

WITH KEY-NUMBER ANNOTATIONS

WITH TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS
WHICH HAVE BEEN PASSED UPON BY THE SUPREME
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OF THE

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[3] Died May 8, 1919.
[4] Resigned August, 1919.
[5] Appointed July 22, 1919, to succeed Joseph T. Johnson.
[6] Appointed August 5, 1919.
[6] Retired pursuant to the statute.

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ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS

(256 Fed. 497)

EASTERN S. S. CORPORATION v. GREAT LAKES DREDGE & DOCK CO.

GREAT LAKES DREDGE & DOCK CO. v. EASTERN S. S. CORPORATION.

(Circuit Court of Appeals, First Circuit. March 7, 1919.)

Nos. 1354, 1355.

1. SHIPPING ⟹204—LIMITED LIABILITY—"VESSEL."

A temporarily sunken drillboat, used for removing ledges, *held* a "vessel," within Rev. St. §§ 4283–4289 (Comp. St. §§ 8021–8027), limiting the liability of vessel owners for collisions occurring without their privity or knowledge.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vessel.]

2. SHIPPING ⟹208—LIMITED LIABILITY—AGENT'S KNOWLEDGE.

The privity or knowledge of a vessel owner's superintendent having general control and direction of its business at Boston *held* the owner's knowledge or privity, within Rev. St. §§ 4283–4289 (Comp. St. §§ 8021–8027), limiting the vessel owner's liability for damages incurred without his privity or knowledge.

3. SHIPPING ⟹209(3)—LIMITED LIABILITY—EVIDENCE.

Evidence that owner of a drillboat was notified of its sinking some three-fourths of an hour before a steamship collided with it, that he was then some three miles from the wreck, etc., does not sustain a finding that he had sufficient opportunity to mark the wreck after receiving news of the sinking and before the collision.

4. NAVIGABLE WATERS ⟹24—WRECK—DUTY TO MARK—KNOWLEDGE OF OWNER.

Act March 3, 1899, § 15 (Comp. St. § 9920), requiring owners of craft sunken in navigable channels to mark their location, is a criminal statute, and the duty imposed does not arise until the owner receives knowledge that his vessel has been sunk.

5. SHIPPING ⟹208—NEGLIGENCE—MARKING WRECK.

A dredge company, locating its drillboat on a ledge in a Boston harbor channel, is charged with knowledge that accidents were liable to occur if it sank and was not marked in a suitable manner, and it was negligent if it failed to man the drillboat with men instructed and reasonably competent to perform the marking.

6. SHIPPING ⟹209(3)—NEGLIGENCE—EVIDENCE.

Evidence that foreman of a drillboat had some 25 years' experience and knew what should be done in case the boat sank, although he was negligent in failing to mark the wreck, *held* not to show that he was incompetent, or that his employer should reasonably have known that he was.

7. SHIPPING ⟹209(3)—NEGLIGENCE—EVIDENCE.

Evidence that engineer on a drillboat had never been instructed to mark the boat in case it sank, and did not know this was required, did not establish the owner's personal negligence.

8. SHIPPING ⟹207—LIMITATION OF LIABILITY—NEGLIGENCE.

A dredge company *held* chargeable personally for damages resulting from a collision with its sunken drillboat, where it failed to instruct a watchman to mark the boat in case it sank.

9. SHIPPING ⟹209(3)—LIMITED LIABILITY—BURDEN OF PROOF.

A vessel owner, seeking to limit its liability for damages resulting from a collision, has the burden of showing that it exercised reasonable care and diligence in manning its boat with competent men.

10. COLLISION ⟹130—DAMAGES—INTEREST.

Awarding a vessel injured by collision interest on damages for loss of property from date of collision, on sums paid for repairs from dates of

payment, and on demurrage from time when damages were liquidated, is within court's discretion.

11. ADMIRALTY ⟹124—COSTS—MILEAGE.

Mileage of witness in a maritime collision case *held* taxable from the place from which he was summoned, although his domicile was at a nearer point.

Anderson, Circuit Judge, dissenting in part.

Appeals from the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Petition to limit liability by the Great Lakes Dredge & Dock Company, to which the Eastern Steamship Corporation, as damage claimant, filed an answer. From a decree (250 Fed. 916), both parties appeal. Affirmed upon appeal of Great Lakes Dredge & Dock Company, and appeal of the Eastern Steamship Company dismissed, without costs.

Charles E. Kremer, of Chicago, Ill., and Fitz-Henry Smith, Jr., of Boston, Mass., for Great Lakes Dredge & Dock Co.

Edward S. Dodge, of Boston, Mass., and Benjamin Thompson, of Portland, Me., for Eastern S. S. Corporation.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. No. 1355 is an appeal from a decree of the District Court for Massachusetts, dismissing the petition of the Great Lakes Dredge & Dock Company, brought under sections 4283–4289 of the Revised Statutes (Comp. St. §§ 8021–8027), to have its liability to the Eastern Steamship Corporation for a collision between the corporation's steamship, the Massachusetts, and the dredge company's drillboat No. 4 determined, and, if liable, the damages limited.

Appeal No. 1354 arises out of the subject-matter of the appeal in No. 1355 and involves certain questions that become material only in case the dredge company is held liable for the collision, but is entitled to have its damages limited.

The collision occurred July 5, 1913, at about 8:18 a. m., at which time the drillboat lay submerged in the channel of Boston Harbor on what is known as the Spectacle Island upper ledge. Under the direction of the court the drillboat was appraised as she lay on the bottom at $13,568, and a stipulation for that amount was filed by the dredge company.

In the District Court the dredge company was held personally and solely at fault, and damages were assessed at $70,499.65, with costs of $617.92.

We fully agree with the findings and rulings of the court below that the dredge company was at fault in that its subordinate agents and servants failed to exercise reasonable care to mark the drillboat after it was sunk, and that the Massachusetts was not at fault in failing to discover the wreck in season to avoid the collision. The dredge company, however, contends that it was not personally at fault; that, on a fair consideration of the evidence contained in the record, it was with-

out that privity or knowledge essential to charge it with personal responsibility.

The evidence discloses that drillboat No. 4 was about 132 feet long, 33 feet beam, and about 8 feet deep; that it was divided into five water-tight compartments, and carried a boiler, drilling machinery, four two-cylinder engines, and other apparatus used in connection with its work. It was built of steel, and, when at work on a ledge, was held in place by four spuds or iron legs 65½ feet long, about 23½ inches square, and weighing 12½ tons each. The spuds were moved up and down in casings about 13 feet long. The casings at their lower ends were flush with the bottom of the boat and extended above the deck about 6 feet. The spuds were located near the corners of the boat, and their lower ends, which were tapered to about 6 or 8 inches square, rested on the ledge or bottom. They were raised or lowered by steam engines operating geared pinions engaged in a rack on each spud. There was a valve on the engines, which, on being turned in a given direction, would permit the engines automatically to aid in moving the spuds up or down according as the tide rose or fell. When the spuds stood perpendicularly, the boat would work up and down automatically with the tide; but sometimes they would jam, and to provide for such cases steam was kept on the engines. The drillboat was towed from the Great Lakes around through the St. Lawrence to Boston Harbor. When being towed, the spuds are raised and held by pawls fastened to the deck.

In the summer of 1913 the dredge company had a contract with the United States government for the removal of ledges in Boston Harbor. Under this contract drillboat No. 4 had been at work for about two weeks before the accident on a ledge almost in the center of the deep channel, which at that point was something over a quarter of a mile wide. There was some twenty-six feet of water over the ledge, so that only vessels of very deep draft paid any attention to it. It was the plan of the government to make a 35-foot channel which would be safe for ships of the deepest draft. No work was done by the drillboat during the day and night of July 4. About 6 o'clock on the evening of July 4, the night crew, when the drill was not working, consisting of Folz and Murphy, went aboard. Folz acted as watchman and mechanic; Murphy acted as fireman. High water occurred about midnight. In the neighborhood of 1 o'clock Folz, who had been working in the pump room, noticed that the drillboat had taken a pronounced list. He went on deck and found that the two front spuds had jammed, so that that side was not lowering with the tide, but was then from a foot to 15 inches higher than the back side of the boat. He tried to start the spuds with the engines, but was unsuccessful. He then called Murphy, and they worked at the spuds with bars, but with no better success. As the tide continued to ebb, the boat tilted more and more. Attached to the drillboat were two scows carrying dynamite, a yawlboat, and a rowboat. About 1·45 a. m., finding that the drillboat was sliding and about to tip over, they jumped upon one of the dynamite scows. One of the two ropes which held the scows to the drillboat, being entangled with the fenders

hanging over the side of the drillboat and it being dark, they cut, and the other parted when the drillboat tipped over.

There were plenty of oars for the yawlboat and the rowboat on the deck of the drillboat, but they were washed overboard before the men took to the scows, and there was only one oar in the yawlboat. The scows and yawlboat with the men drifted on the outgoing tide towards the lower harbor until about 3:30 a. m., when they were picked up by the tug Sadie Ross and were slowly hauled up past the sunken drillboat No. 4 to drillboat No. 8, belonging to the dredge company, and which was located about 6,400 feet further up the harbor. As they came past drillboat No. 4, it would have been entirely feasible for them to have stopped and anchored the yawlboat to the sunken drillboat, whose sand pipes were then extending out of the water some 3 and 6 feet, respectively, and thus have marked it as a warning. This, however, was not done. They reached drillboat No. 8 at about 5:30 a. m. About 6 a. m. a Boston police boat called at drillboat No. 8 and inquired if the men who had been adrift were there, and on receiving an affirmative answer left, without being told of the wreck or asked to mark it. About 6:15 or 6:20 the day crew of No. 4 arrived at drillboat No. 8, with Hancock, the foreman of No. 4, and after making observations of the wreck, and seeing that the sand pipes were projecting out of the water, as he thought some 2½ and 5 or 6 feet, Hancock went ashore with the men, including Folz, to find Superintendent Williams. While they were ashore looking for Mr. Williams, the steamship Massachusetts came in from New York and at about 8:18 ran into the wreck, which was then submerged.

[1] In considering the right of the dredge company to a limitation of its liability under section 4283, it is necessary to determine whether its drillboat No. 4 was a vessel, as defined in section 4289, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 (Comp. St. § 8027).

The word "vessel," as there defined, applies "to all seagoing vessels, and also to all vessels used on lakes or rivers in inland navigation, including canal boats, barges and lighters," and has been held to include a barge without motive power used for transporting excursion parties (In re Myers Excursion & Navigation Co. [D. C.] 57 Fed. 240; The Republic, 61 Fed. 109, 9 C. C. A. 386); a mud scow used in Boston Harbor for moving mud (In re Eastern Dredging Co. [D. C.] 138 Fed. 942); a scow originally constructed and used for carrying stone, and later provided with a derrick and used for raising stone (The Sunbeam, 195 Fed. 468, 115 C. C. A. 370); and a scow carrying a pile driver permanently attached thereto (In re Sanford Ross [D. C.] 196 Fed. 921, Id., 204 Fed. 248, 122 C. C. A. 516).

Revised Statutes, § 3 (Comp. St. § 3), defines what craft are vessels for the purposes of the maritime law, and in In re Eastern Dredging Co. (D. C.) 138 Fed. 942, 944, it was held that "all craft which are vessels for the purposes of the maritime law are vessels within the intent of the act as it now stands," meaning within the intent of the act of 1851 (sections 4283–4289) as amended in 1886. In the case of Charles Barnes Co. v. One Dredgeboat (D. C.) 169 Fed. 895, Judge Cochran, after an extended review of the cases in an endeavor to as-

certain what was a vessel within the meaning of section 3, held that a navigable structure, intended for the transportation of a permanent cargo, and that had to be towed in order to navigate was a vessel. The vessel there in question was a pumpboat. It consisted of a floating structure, equipped with an engine, boiler, pumps, pipes, and capstans, which were permanently attached, and it was used for pumping out coal barges.

Drillboat No. 4 was a navigable structure having a permanent cargo, viz. its engines, boiler, drilling machinery, etc., which it transported from place to place for the purpose of removing ledges in navigable waters and as an aid to commerce and navigation. It was not a floating dry dock intended to be permanently moored, as was the case in Cope v. Vallette Dry Dock Co., 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501; but was intended and used for the transportation of a cargo which it carried from place to place to remove ledges. We are therefore of the opinion that it was a vessel, within the meaning of sections 4283–4289, as construed in the cases above cited.

We also think that the drillboat, by being temporarily sunk, did not cease to be a vessel, and that the dredge company is not to be deprived of the benefit of the provisions of section 4283, provided the fault that caused the collision was without its privity or knowledge, or that of its general manager, Williams. In the Sanford Ross (D. C.) 196 Fed. 921, 926, an accident occurred on a scow fitted out as a pile driver while it was resting upon the bottom at low tide, and it was held that the scow did not lose its character of a vessel by being grounded temporarily, as it was the intention that it should be towed before proceeding to the next position for driving piles.

In the District Court the dredge company's claim for a limitation of liability was denied upon the grounds: (1) That the drillboat, at the time it was sunk, was improperly manned, in that neither Folz nor Murphy were men fitted to exercise, under conditions which might reasonably be foreseen, prudent and careful seamanship, and was therefore unseaworthy; that this fault was attributable to the petitioner personally, and was the cause of the accident, as Folz and Murphy, whose duty it was to take steps, after the sinking, to warn other vessels of the wreck, failed to do so because of their incompetency; and (2) that Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (Comp. St. § 9920), as construed in the Anna M. Fahy, 153 Fed. 866, 83 C. C. A. 48, in The Macy, 170 Fed. 930, 96 C. C. A. 146, in Weisshaar v. Kimball S. S. Co., 128 Fed. 397, 402, 63 C. C. A. 139, 65 L. R. A. 84, and in J. Smith & Sons, Inc., 193 Fed. 395, 113 C. C. A. 391, made it the personal duty of "the owner of such sunken craft to immediately mark it," and that this duty could not be delegated, so as to relieve the owner from responsibility. In holding the dredge company liable on this ground, the court evidently assumed that, inasmuch as Williams was the general superintendent of the petitioner's operations around Boston and the petitioner was a corporation, the privity or knowledge of Williams was the privity or knowledge of the petitioner, for it found "that Williams was informed that the drillboat had sunk early enough so that, if he had sharply set about marking the

wreck, he could have done so before the collision," and that his negligent and unexcused failure to do so was a disregard of the statutory duty and attributable to the petitioner personally.

[2, 3] We agree with the court below that, inasmuch as Williams had the general control and direction of the company's business at Boston, his privity or knowledge was the privity or knowledge of the corporation. Craig v. Continental Ins. Co., 141 U. S. 638, 646, 12 Sup. Ct. 97, 35 L. Ed. 886; Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co. (D. C.) 162 Fed. 912; The Erie Lighter (D. C.) 250 Fed. 490, 494. But we do not think that the evidence warrants the finding that he was informed of the sinking of the drillboat sufficiently early, so that he could reasonably have been expected to have marked the wreck before the collision occurred. The collision occurred July 5, 1913, not later than 8:18 a. m., and the evidence was that Mr. Williams was not informed of the sinking of the drillboat until 7:30 that morning, when he was found by Hancock at the Atlantic works, some three miles or more distant from the wreck, and that, upon procuring a launch, he and Hancock started for the wreck, and while on their way passed the Massachusetts going to her dock in Boston Harbor. The collision had then taken place, and we do not think it could reasonably be found that he had a sufficient opportunity to mark the wreck after he knew that the drillboat was sunk and before the accident occurred.

[4] The statute of 1899 is a criminal statute, and the failure of duty on the part of the owner of a vessel sunk in navigable waters there penalized is failure to mark the wreck after knowledge of the fact necessitating the performance of the duty; and the duty there imposed upon the owner as a basis for civil liability cannot be greater and will not arise until after knowledge that the vessel is a wreck. This is the construction placed upon the statute in The Fahy and other cases above cited. The act of 1899, therefore, is not, as has been suggested, in conflict with section 4283, but in harmony with its provisions, for the duty imposed on the owner is a personal one.

[5] Was it the duty of the petitioner to see that the drillboat was manned with men fitted to exercise, under conditions which might reasonably be foreseen, prudent and careful seamanship, and does the evidence disclose that Folz and Murphy, by previous training and experience, were incompetent, or that Hancock, the foreman, was likewise incompetent and that this was known, or ought to have been known to Williams?

If there was a duty cast upon the owner to see that the drillboat was properly manned, it did not arise out of a contract relation, for there was no contract between the dredge company and the steamship company. The duty therefore arose, if at all, out of some other relationship of the parties, and was one imposed by law due to that relationship. The law governing actions for negligence has for its foundation the rule of reasonable conduct. That rule has to do with one's acts with reference to the person, property, or rights of another. It is a rule of relation. If there be no relation, there is nothing upon which the rule can operate. But when one knows or has reason to

believe his conduct may affect injuriously the person or property of another, then a duty arises requiring him to exercise reasonable care to see that his acts do not result injuriously to the person or property of that other. So, when the dredge company located its drillboat on the ledge in the channel in Boston Harbor, knowing, as it must, that ships would be navigating in that locality and that accidents were liable to occur, in case it sank, if it was not marked in a suitable manner, the law imposed upon it the duty of manning the drillboat with men charged with the duty of marking the wreck and reasonably competent to perform that duty.

In the District Court it was found that Folz, Murphy, and Hancock were all thoroughly competent men for the operation of drillboats, but that none of them appeared to have been competent seamen, or to have had any general knowledge of vessels or the proper management of them. The evidence shows that Hancock, at the time of the accident, had been engaged for 25 or 28 years in the handling of drillboats; that he helped to build drillboat No. 4 in 1907 or 1908, and "bring her out"— probably meaning bring her from the Great Lakes to Boston—and that he had been the foreman of her most of the time since; that he knew that the act of 1899 required the owner of sunken wrecks to mark them; and that he would have done so at the time he observed the wreck, had he not thought that the two sand pipes, which were about 6 inches in diameter and protruded out of the water 2½ and 5 or 6 feet, respectively, at the time he observed them, sufficiently marked it. Hancock had worked in Boston Harbor on this drillboat since October, 1911, a period of nearly 2 years. He knew that the mean rise of the tide in that locality was then about 9½ feet, and, if his testimony is to be believed, his judgment was, on observing the wreck, that it would not rise sufficiently to cover and obscure the protruding sand pipes. He no doubt was wrong in entertaining this idea, and was negligent in acting upon it without marking the wreck; but it is difficult to believe that the petitioner should be held personally at fault for putting him in charge of the drillboat, in view of his long experience and his knowledge of what it was necessary to do in case the drillboat sank, and we think that it cannot fairly be said that he was incompetent, or that the petitioner or Williams ought reasonably to have known that he was.

[6-8] As to Folz and Murphy, the evidence was that Murphy's duty was to run the boiler to keep up steam for the engines; that he was a marine fireman with 11½ years' experience, and had a license; that he had been employed on drillboat No. 4 for 8 months, and that he had had much experience the past 11 years in going to sea, during which time he acted as fireman. He had never been instructed to mark the drillboat in case it sank, and he did not know that the owner of a sunken vessel was required to mark it, and it would seem that it was not reasonably necessary that he should have known or been so instructed, as his work was that of an engineer. The duty of placing warning signals, to the extent at least of hanging out lights, devolved upon Folz, who was required, when he came on duty at night, to light all the lights and hang them out at both ends of the drillboat and look after the

spuds. Folz had worked on drillboats for 5 or 6 years, and on this boat since some time in 1911. When the drillboat was in operation, he had to do with the blasting of the holes that were drilled, and when it was not in operation he worked as a watchman. He testified that he knew the owners of vessels sunk in navigable waters were required to mark them, but that he had never been instructed by the foreman or any one representing the dredge company to mark the drillboat in case she sank, and Williams testified that he had never instructed his men, in the event of the drillboat sinking, to mark it, although that duty would devolve upon him, if any instructions were necessary. Folz's testimony also shows that from about 5:30 to 6:30 on the morning of the accident he had ample opportunity to mark the wreck and means at hand with which to do it. He then knew that the tide was rising, or was about to rise, but what he knew as to the mean rise of the tide did not appear. It is as probable that he did not know what the mean rise of the tide was as that he did, and that he had no means of judging whether it would rise and obscure the sand pipes or not. He made no effort to mark the wreck or to have any one else mark it. He could have asked the police boat at 6 a. m. to do so if he had understood it was his duty to have it done, but he did not. In view of his conduct at the time, and of the fact that no one representing the company had told him that it was his duty to mark the boat in case she sank, or how to do it, we think it is more probable than otherwise that he did not regard it as his duty, and for this reason omitted marking her. As due care on the part of the dredge company or its general manager, Williams, required that it should have directed Folz to see that the boat was marked in case she sank, and it failed to do so, its failure in this respect was the cause of the collision, and was a fault for which it was chargeable personally.

It is contended that the dredge company had no reason to anticipate that the drillboat might sink, and therefore it was not called upon to instruct Folz what to do in such a contingency; but, as it was generally known that vessels in encountering the perils of the sea were liable to be sunk, and also known that drillboats and dredges, supported by spuds, when subjected to like perils, had sunk, we think it was bound to have foreseen that such a situation might arise, and that it should have instructed Folz with reference thereto.

[9] The burden was upon the dredge company to show that it exercised reasonable care and diligence to see that the drillboat was manned with competent men. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1183; The Wildcroft, 201 U. S. 378, 388, 26 Sup. Ct. 467, 50 L. Ed. 794; International Navigation Co. v. Farr, etc., Mfg. Co., 181 U. S. 218, 225, 226, 21 Sup. Ct. 591, 45 L. Ed. 830. In recognition of this, the dredge company, in its petition, alleged as follows:

"At the time of the sinking of the said drillboat No. 4, the same was in every way seaworthy and fit and proper for the uses for which it was built and used, and that its appliances were in good condition, it had on board a sufficient number of competent men, and that the said sinking of the said drillboat No. 4 and the collision with the same by the said steamer Massachu-

setts, were occasioned or incurred without the privity or knowledge of this petitioner."

It failed to sustain the burden of this allegation.

[10] The dredge company also complains that the District Court erred in its allowance of interest on the damages awarded for loss of property from the date of the collision, on the sums paid for repairs from the dates of payment, and on demurrage from the time when the damages were liquidated. The allowance of interest in cases of this kind rests in the discretion of the court. The Albert Dumois, 177 U. S. 240, 255, 20 Sup. Ct. 595, 44 L. Ed. 751; The Scotland, 118 U. S. 507, 518, 6 Sup. Ct. 1174, 30 L. Ed. 153; Straker v. Hartland, 2 H. & M. 570, 575; Frazer v. Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620; The Rabboni (D. C.) 53 Fed. 948, 952. Complete restoration required the payment of interest. Judge Hazel, in discussing the question of the allowance of interest in collision cases in The Gilchrist (D. C.) 173 Fed. 666, at page 672, said:

"On the settlement of final decree the question arose whether interest on demurrage should properly be allowed from the date of loss, as specified in the stipulation filed herein, or from the entry of decree. Heretofore this court apparently held in The Sitka [D. C.] 156 Fed. 427, on the authority of The Eloina [D. C.] 4 Fed. 573, that interest on demurrage was only recoverable from the date of decree, and not from the date of loss or injury. But this broad holding is not sustained by the weight of prior decisions. Collision cases are now called to my attention by which it is clearly shown that, not only is demurrage a proper element of damage, but that interest should be allowed from the time of collision, unless in the discretion of the court there are special reasons for its disallowance."

[11] The dredge company further contends that the court below erred in allowing taxation of mileage for one Colbath, a witness for the steamship company, from New York City to the place of trial, although his domicile or home was in Melrose, Mass. The taxation was in accordance with the previous rulings of this court. City of Augusta, 80 Fed. 297, 304, 25 C. C. A. 430; United States v. Sanborn (C. C.) 28 Fed. 299; The Governor Ames, 187 Fed. 40, 50, 109 C. C. A. 94.

In view of the conclusion here reached, the questions sought to be raised in No. 1354 become immaterial and are not considered.

In No. 1355 the decree of the District Court is affirmed, with interest and costs to the appellee; in No. 1354, the appeal is dismissed without costs.

ANDERSON, Circuit Judge (dissenting in part). In the conclusion that the dredge company is not entitled to limit its liability I concur. From the reasoning of the foregoing opinion I am constrained to dissent; I think it lays down propositions unsound and fraught with serious danger.

(1) I do not think this drillboat was a vessel within the meaning of the limited liability acts. I think the weight of authority and of sound argument is that it was not a vessel.

R. S. § 3, defines a vessel as follows:

"The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

Was this drillboat a "means of transportation" within the fair meaning of those words? Its essential character was that of a marine machine shop. When at work it rested on the earth. Its work was not carriage; it was drilling. True, its legs could be drawn up, and it could then be towed by a tug from place to place. It was somewhat like a pontoon or dry dock. But the Supreme Court held in Cope v. Vallette Dry Dock Co., 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501, that a dry dock, consisting of a large oblong box with flat bottom and perpendicular sides, with no means of propulsion either by wind, steam, or otherwise, and not destined for navigation, but only as a floating dry dock permanently moored, was not a vessel. Mr. Justice Bradley said:

"The fact that it floats on the water does not make it a ship or vessel, and no structure that is not a ship or vessel is a subject of salvage. A ferry bridge is generally a floating structure, hinged or chained to a wharf. This might be the subject of salvage as well as a dry dock. A sailor's floating bethel, or meetinghouse, moored to a wharf, and kept in place by a paling of surrounding piles, is in the same category. It can hardly be contended that such a structure is susceptible of salvage service."

I regard the reasoning in that case as practically concluding the point.

Undoubtedly, as pointed out by Judge Dodge in the case of The Scow No. 34 (see In re Eastern Dredging Co. [D. C.] 138 Fed. 942, 945), the amendment of 1886 extended the scope of the limited liability act of 1851. That act originally provided in express terms that it should not apply to owners of canal boats, barges, or lighters. Compare Simpson v. Story, 145 Mass. 497, 14 N. E. 641, 1 Am. St. Rep. 480. But barges and lighters, now included, are to some extent commercial carriers. They may fairly be called a part of our merchant marine. Clearly, the original purpose of Congress was to encourage investments in ships and to promote commerce upon the high seas. When the act was extended to cover barges and lighters, the basic notion of promoting commerce and navigation by increasing carrier service was not, in my view, abandoned. Congress did not, as it seems to me, intend to limit the doctrine of respondeat superior for the benefit of every owner of anything which could be floated and which might, as an incident of its use, occasionally be floated. A dry dock was floated from the United States to the Philippines. The facts that it was floated and (to use the language of the majority opinion) was "an aid to commerce and navigation" did not make it a vessel within the meaning of the limited liability acts. A bell buoy floats and is an aid to navigation; is it a vessel? Piers and lighthouses are great "aids to navigation." So is every means of improvement of navigable waters. But something more is necessary in order to make the "aid" a "vessel," within the meaning of the limited liability acts.

It is true that in the P. Sanford Ross Case (D. C.) 196 Fed. 921, it

was held that a barge on which was mounted a pile driver, described as "a permanent cargo," was a vessel within the limited liability acts. But this pile driver might have been removed and the barge used for ordinary transportation work. Drillboat No. 4 was much more like the dry dock than like the barge with the attached pile driver.

Judge Cochran's able and exhaustive review of the cases in 169 Fed. 895, shows that the courts have hitherto extended the statute to the very verge. I think this decision, holding this long-legged steel box or marine machine shop to be a vessel, goes beyond any decision hitherto made, and extends the statute to the point of perverting the congressional intent.

To hold that this drillboat was a vessel is nearly, if not quite, to change the statutory definition so as to read: "The word 'vessel' includes every artificial contrivance capable of being floated." It eliminates the idea that the thing floated shall be "a means of transportation"—that is, that it shall perform some carrier function.

The determination of this case does not, in my opinion, require us to hold that this drillboat was a vessel. To extend the doctrine of limited liability to everything floated and floatable is, in my view, to menace, and not to promote, commerce and navigation.

(2) This drillboat, whether vessel or not, was negligently sunk in a navigable channel. There was no vis major to account for the sinking. There was something wrong with the construction, the state of repair, the manning, or the operation, else it would not have sunk in a smooth summer sea. Res ipsa loquitur. 29 Cyc. 590. But, even if the original sinking had not been negligent, I agree with my Brethren in holding that there was negligence both of owner and employé in failure promptly to mark the submerged obstruction, so as to warn those rightly using the navigable channel of its presence. The negligent creation and maintenance of this obstruction, in this navigable channel, a great public highway, constituted a public nuisance. The unlawful obstruction of a public highway has always been a public nuisance. Joyce on Nuisances, § 214; Woodman v. Pitman, 79 Me. 456, 462, 10 Atl. 321, 1 Am. St. Rep. 342. Any individual suffering special and material damage from a public nuisance can recover therefor from the one causing such nuisance. Joyce on Nuisances, §§ 218, 219, 220; Staples v. Dickson, 88 Me. 362, 34 Atl. 168.

The case ought, in my view, to be determined on the simple and elementary principles laid down by the Massachusetts Supreme Judicial Court in Boston & Hingham Steamboat Co. v. Munson, 117 Mass. 34. That was a case to recover for injuries to the plaintiff's steamboat caused by running upon a sunken scow belonging to the defendant. The defendant, while trying to raise the scow, left the public unwarned of the obstruction caused by it. The court said:

"If a person negligently places an obstruction in a highway, he is liable for any injury caused thereby to a traveler using due care. So if a person negligently obstructs navigable waters, he is liable for injuries caused to vessels in the proper use of such waters. * * * When a vessel is sunk by unavoidable accident, in navigable waters, whether in the usual track of navigation or not, the owner, until he abandons, must use due care to prevent injury to other vessels"—citing White v. Crisp, 10 Exc. 312; Brown v. Mallett, 5 C. B. 599.

To my mind this statement covers everything that needs to be said about the case at bar.

The same principle was asserted in the case of The Snark, [1900] P. D. 105; also in the case of The Utopia, [1893] App. Cas. 492.

A sunken vessel in navigable waters, even if abandoned, may, and ordinarily does, constitute a public nuisance. Detroit Water Commissioners v. Detroit, 117 Mich. 458, 76 N. W. 70. Apart from statute, the owner of a sunken vessel had the right to abandon it, and after abandonment would apparently not be liable for maintaining a public nuisance. Rex v. Watts, 2 Esp. 675; Winpenny v. Philadelphia, 65 Pa. 135; Ball v. Berwind (D. C.) 29 Fed. 541.

So far as I have been able to discover, it has never hitherto been even contended that liability for creating or maintaining a public nuisance in navigable waters is subject to the limited liability acts. England has had a limited liability act since 1734. Stat. 7 Geo. II, c. 15. Rev. Stats. § 4283, taken from the act of 1851, was grounded mainly upon the English statutes of 26 Geo. III, passed in 1783, and 53 Geo. III, passed in 1813. But I have not been able to find that in England it has ever been claimed that these English acts limited liability for the negligent obstruction of navigable waters.

Our own limited liability act was passed nearly 70 years ago. It would be extraordinary if this be the first instance in which a negligently sunken barge or vessel has as a wreck caused damage in excess of its own salvage value. But I can find no case in this country in which it has been claimed that liability for wrecks, negligently caused or maintained in navigable waters, is limited by the acts passed to encourage shipowners and to promote navigation.

Navigation will not be promoted by lessening liability for the creation or maintenance of public nuisances in navigable waters. Congress has appropriated hundreds of millions of dollars for the improvement of navigable waters. It is to my mind inconceivable that responsibility, arising under elementary principles, for obstructing navigable waters, was intended by Congress to be held subject to the limited liability acts. If there is any field in which the doctrine of respondeat superior should be held in full force and effect, it is in the field of the creation or the maintenance of public nuisances in the sea highways.

The history and policy of the limited liability acts are dealt with elaborately in Walker v. Transportation Co., 3 Wall. 150, 18 L. Ed. 172; Moore v. Amer. Transportation Co., 24 How. 1, 16 L. Ed. 674, a decision in 1861; New York Transportation Co. v. Wright, 13 Wall. 104, 20 L. Ed. 585; La Bourgogne, 210 U. S. 95, 120, 28 Sup. Ct. 664, 52 L. Ed. 973; Providence Steamship Co. v. Hill, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; Butler v. Boston & Savannah Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134; Walker v. Boston Insurance Co., 14 Gray (Mass.) 288; Hill v. Prov. S. S. Co., 113 Mass. 495, 18 Am. Rep. 527; same case, 125 Mass. 292. See, also, The Main v. Williams, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381; Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110.

In none of these cases do I find any countenance or support for the doctrine of holding these acts applicable to cases of negligence in obstructing navigable waters.

Under the doctrine asserted by the majority opinion in this case, the financially responsible owner of a barge or scow, negligently sunk or negligently left unmarked in a navigable channel, might with practical impunity do hundreds of thousands of dollars of damage to great ships, perhaps destroying lives. Such a doctrine is, it seems to me, unwise and an unnecessary shield for negligence in selecting and instructing and training employés. There is a great practical difference between holding the owner of an obstruction in navigable waters, negligently caused or maintained, responsible for all acts of negligence of all his employés, and the doctrine laid down by the majority, which throws the burden upon the victim of the negligent injury of showing specific negligence in the selection or instruction of the particular employé guilty of the default causing the damage.

Of course, if Congress has passed laws leading to such undesirable results, it is our duty to enforce them; but I am unable to believe that the national Legislature intended to ground any such sea highway policy.

Certainly the limited liability acts do not, in terms, destroy the common-law right of the victim of negligence in obstructing a public highway to recover damages suffered. As stated by Justice White in Texas, etc., Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 437, 27 Sup. Ct. 350, 354 (51 L. Ed. 553, 9 Ann. Cas. 1075):

> "We must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

Full efficacy will be given to the limited liability statutes without extending them to cover negligence of shipowners' servants in causing or maintaining hidden traps for other vessels in navigable waters. The statutory right and the original common-law right are not only not repugnant, but they both make for the same end, to wit, the safety of property invested in vessels.

I think a sunken wreck, left unmarked either temporarily or permanently, is a menace to navigation, differing not only in degree, but in kind, from the danger to other vessels arising from the careless navigation of a vessel still afloat, just as a moving automobile is an entirely different sort of peril from the unmarked wreck of an automobile in the dark. As long as a vessel is afloat, however careless the navigators, regard for their own safety impels them to some degree of care to avoid collision with other vessels. So long as a vessel is afloat and visible, however badly handled, other vessels have a chance, by using extraordinary care and skill, to avoid the results of the negligence of their fellow traveler in the common highway. But after a vessel is sunk, and left unmarked and unmanned, it ceases, in my

view, to be a "vessel" within the meaning of the limited liability acts. It is a trap, a nuisance; its victims have no chance for life and safety. I cannot believe that Congress ever intended to limit the doctrine of respondeat superior for the benefit of the owners of a nuisance in navigable waters.

Nor am I able to agree with my brethren in the interpretation put by them upon the statute of March 3, 1899, and the decisions made by other courts under that statute.

In the majority opinion it is stated as follows:

"The statute of 1899 is a criminal statute, and the failure of duty on the part of the owner of a vessel sunk in navigable waters there penalized is failure to mark the wreck after knowledge of the facts necessitating the performance of the duty; and the duty there imposed upon the owner as a basis for civil liability cannot be greater and will not arise until after knowledge that the vessel is a wreck. This is the construction placed upon the statute in The Fahy and other cases above cited. The act of 1899, therefore, is not, as has been suggested, in conflict with section 4283, but in harmony with its provisions, for the duty imposed on the owner is a personal one."

Apparently this means that the owner of a vessel negligently sunk or negligently left unmarked in navigable waters is not liable under the ordinary doctrine of respondeat superior for the negligent acts of his servants, but is only liable after the owner himself has knowledge of the situation.

Such has not been the interpretation put upon the act by other courts. In The Anna M. Fahy, 153 Fed. 866, 83 C. C. A. 48, the court said:

"The law places the duty of marking the wreck upon him [the owner] and he cannot escape responsibility by delegating it to others."

In The Macy, 170 Fed. 930, 96 C. C. A. 146, the court said:

"This statute was before us in The Anna M. Fahy, 153 Fed. 866, 83 C. C. A. 48, where it was held that the duty of marking the location of a wreck was placed by the statute on the owner, and no one else, and that there is no divided responsibility."

In Lehigh & Wilkesbarre Coal Co. v. Hartford & New York Transportation Co. (D. C.) 220 Fed. 348, 351, Mayer, District Judge, said:

"The importance of this legislation is obvious, and the tendency of the courts has been to hold owners strictly to the requirement of the statute."

While it may be true that in each of these cases the owner himself had knowledge or opportunity of knowledge of the wreck, yet the language used by the courts indicates their view that owners are responsible under the ordinary doctrine of respondeat superior for every act of negligence of their employés. To hold, as the majority apparently do in the above quotation, that this statute asserts failure of duty only "after knowledge of the facts necessitating the performance of duty" by the owner himself, is to extend the limited liability acts into the field of negligence in obstructing navigable waters. It reads into this statute of 1899 the "privity or knowledge" of the act of 1851. This amounts to saying that the owner of any vessel negligently sunk, or negligently left unmarked in a navigable channel, shall not be liable

for the acts of his agents in causing or maintaining such nuisance, unless the negligence was "with the knowledge or privity of the owner." I cannot agree with that interpretation of the statute.

As I have already indicated, even before the passage of the act of March 3, 1899, I do not think the limited liability acts had any application to the creation and maintenance of nuisances in navigable waters. So far as private liability is concerned, the act of March 3, 1899, seems to me but declaratory of previously existing maritime law. Compare The Caldy (D. C.) 123 Fed. 802, 804; The Plymouth, 225 Fed. 483, 140 C. C. A. 1.

That statute is a part of the Rivers and Harbors Act of the Fifty-Fifth Congress. See 30 Stat. c. 425, U. S. Comp. Sts. Ann. 1916, §§ 9918–9924. A large part of it is a compilation of police regulations concerning the improvement, maintenance, preservation, and protection of navigable waters and of property of the United States in and adjacent to such waters. As there is no common law of the United States prohibiting the obstruction of and creation of nuisances in navigable waters, such legislation was necessary in order to equip the national government with criminal penalties analogous to the power of indictment for public nuisances which the sovereign of England and the states have always exercised. Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8, 8 Sup. Ct. 811, 31 L. Ed. 629.

Clearly there is nothing in this legislation which can be fairly construed as cutting down previously existing civil liability for negligent obstruction of navigable waters. On the contrary, this act emphasizes the congressional purpose of holding all persons fully responsible, criminally as well as civilly, for such negligent obstruction.

Moreover, section 20 of the act expressly "repeals all laws or parts of laws inconsistent" therewith. There is no saving clause making the liability created or recognized by the act of 1899 subject to the limited liability acts, as there is in the Harter Act of February 13, 1893, c. 105, 27 Stat. 445, Comp. Sts. Ann. 1916, §§ 8029–8035.

If Congress had intended the owners of wrecks negligently caused or negligently left unmarked in navigable waters to have the benefit of the limited liability acts, cutting down the common-law liability arising under the doctrine of respondeat superior, we might fairly have expected the insertion of a saving clause to that effect, such as we find in the Harter Act.

I cannot, therefore, agree that the act of March 3, 1899, can be held merely a criminal statute. I think it clear that it ought not to be so narrowly limited, unless previous civil liability for negligent obstruction of navigable waters is held as broadly applicable as I have argued. Section 15 of the act of 1899 provides in express terms that—

"It shall not be lawful * * * to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels. * * * And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful." 10 U. S. Comp. Sts. Ann. 1916, § 9920.

The opinion of the District Judge does not, it seems to me, warrant the interpretation put upon it by my brethren. That court did not hold the statute of 1899 applicable merely on the ground that "Williams was informed that the drillboat had sunk early enough so that, if he had sharply set about marking the wreck, he could have done so before the collision." The District Court held that the statute of 1899 created, or recognized, a civil liability for negligence in obstructing navigable channels enforceable against the owner under the ordinary principles of common law, including therein respondeat superior. I concur in that view.

(256 Fed. 512)

PELL et al. v. McCABE et al.

(Circuit Court of Appeals, Second Circuit. January 30, 1919.)

No. 136.

1. COURTS ⟹264(1)—FEDERAL COURTS—ANCILLARY JURISDICTION.
   If a federal court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit, without regard to the citizenship of the parties, the amount in controversy, or any other factor that would ordinarily determine jurisdiction.

2. COURTS ⟹264(4)—ANCILLARY JURISDICTION.
   An ancillary suit may be maintained, inter alia, to prevent the relitigation in other courts of the issues heard and adjudged by that court in the original suit, and to protect the titles and rights acquired under its judgment or decree from attack based on the theory that the adjudication in the original suit was illegal or ineffective.

3. COURTS ⟹264(4)—JURISDICTION OF FEDERAL COURT—ANCILLARY SUIT.
   An order confirming a composition by a bankrupt partnership, which provided that creditors who assented should be deemed to have released a third person, not adjudicated a bankrupt, and whose relation to the firm was not determined, from liability on any claim against the bankrupts, was not an adjudication that such third person was not liable for such claims, and a suit to enjoin an action against him, based on fraud and charging him as a partner, brought in another jurisdiction by persons who filed no claim and did not assent to the composition, is not ancillary to the bankruptcy proceeding.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Stephen H. P. Pell and others against W. Gordon McCabe, Jr., and another. Decree for defendants, and complainants appeal. Modified and affirmed.

For opinion below, see 254 Fed. 356.

This suit is brought by plaintiffs for the purpose of enjoining the defendants from proceeding in an action now pending in the United States District Court for the Eastern District of South Carolina, so far as it proceeds against Robert M. Thompson as a general partner of S. H. P. Pell & Co. upon any claim which was provable in bankruptcy. It also seeks to enjoin the defendants from continuing that action in South Carolina, or instituting any other action upon transactions between defendants and plaintiffs, or upon the plaintiffs' fraud in said dealings, which was not at

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the time known to defendants, and it further seeks to enjoin defendants from attacking, questioning, or challenging the power and jurisdiction of the United States District Court for the Southern District of New York to make certain orders to which reference is hereinafter made.

The South Carolina suit is for the recovery of moneys said to have been obtained from the plaintiffs by the defendants by fraud and deceit. Neither plaintiffs nor defendants reside within the Southern district of New York.

The plaintiffs were members of the firm of S. H. P. Pell & Co., cotton brokers on the New York Cotton Exchange. The defendants are residents of South Carolina, who prior to December 23, 1912, employed the brokers mentioned to buy and sell cotton on their behalf on the New York Cotton Exchange.

The plaintiffs contend that by reason of certain proceedings had in the United States District Court for the Southern District of New York in the bankruptcy proceedings of S. H. P. Pell & Co. these defendants cannot maintain an action, in South Carolina or anywhere, against these plaintiffs, and that they should be enjoined from doing so. The facts with reference to those bankruptcy proceedings are as follows:

On July 31, 1914, S. H. P. Pell & Co., New York Cotton Exchange brokers made a general assignment for the benefit of creditors.

On August 3, 1914, an involuntary petition in bankruptcy was filed by three creditors having provable claims exceeding $500 in the District Court for the Southern District of New York to have the firm of S. H. P. Pell & Co., and Charles A. Kittle and Howland H. Pell, individually, composing the said firm, adjudicated involuntary bankrupts. Robert M. Thompson was not made a party by that petition. S. H. P. Pell & Co. was, however, a limited partnership formed under the laws of the state of New York. The firm consisted of the two Pells above named and Kittle as general partners, and Robert M. Thompson as a special partner.

Receivers in bankruptcy were appointed, who immediately qualified. When they took possession of the assets of the firm, they found among them a large amount of securities and stocks which were claimed to be the individual property of Robert M. Thompson.

On October 2, 1914, the alleged bankrupts filed schedules, in which was set forth the indebtedness of S. H. P. Pell & Co. to Robert M. Thompson in the sum of $3,373,082.30, and that defendants were debtors in the sum of $261.52.

On October 19th of the same year the receivers of S. H. P. Pell & Co. notified the defendants that they were scheduled as debtors in the schedules filed in the bankruptcy court for the sum of $261.52, and on the same day further demanded payment from the defendants of a claim for $91,467.57 in favor of the bankrupts. Pell & Co. had, prior to December, 1913, acted as cotton brokers on the New York Cotton Exchange, and claimed that the defendants owed them $91,467.57 and $261.52.

On November 21st of the year aforesaid the defendants remitted to the receivers the sum of $261.52, being the amount previously demanded; and on November 23d and 28th of that year petitions were filed in the bankruptcy proceedings, which prayed that Robert M. Thompson be made a party to those proceedings and adjudicated a general partner and a bankrupt.

Negotiations were had at this time between the bankruptcy receivers, the New York Cotton Exchange, Robert M. Thompson, and the bankrupts (firm and individuals) for:

"(1) The adjustment and settlement of the claims of the New York Cotton Exchange creditors, aggregating over $2,000,000.

"(2) The threatened sale of certain securities loaned by Robert M. Thompson to the bankrupt firm, and large deficiency, and the assumption by Robert M. Thompson of certain firm liabilities aggregating $2,100,000, and his agreement to hold the bankrupt estate harmless.

"(3) The withdrawal of the scheduled claim of Robert M. Thompson against the bankrupt estate for $3,373,082.50, and the release of the bankrupt estate therefrom.

"(4) The settlement of all questions and disputes with release and discharge of Robert M. Thompson and the dismissal of the intervening petitions against Robert M. Thompson."

The result was a plan of settlement in pursuance of which the bankrupts made an offer of compromise and composition which contained the following provisions concerning Robert M. Thompson:

"First. This offer is made in consideration of the discharge of the bankrupts, Stephen H. P. Pell, Charles A. Kittle, and Howland H. Pell, from their debts, both individual and partnership, and of the release of Robert M. Thompson from any and all liability to said S. H. P. Pell & Co., and from any and all liability to any creditor of S. H. P. Pell & Co."

"Ninth. Each and every creditor of S. H. P. Pell & Co. who shall assent to this offer of composition shall, upon the final confirmation of such composition by the court, be deemed conclusively by his said assent thereto to have released Robert M. Thompson of and from any and all liability to such creditor on account of any connection of said Robert M. Thompson with S. H. P. Pell & Co. or any transaction of said Robert M. Thompson by or through S. H. P. Pell & Co."

"Twelfth. It shall be adjudged herein * * * there shall be no liability to said Thompson on the part of the estate of S. H. P. Pell & Co. by reason of any rights or claims of any person. * * *

"Fourteenth. The intervening petitions herein of Logan and Bryan and of Heineken and Vogelsang et al. shall be dismissed, without costs."

The intervening petitions above referred to, which were to be dismissed, were those asking to have Thompson declared a general partner of S. H. P. Pell & Co. and adjudicated a bankrupt.

The bankruptcy court, by formal order on January 25, 1915, confirmed the proposed compromise and offer of composition which had previously received the consent in writing of more than a majority in number and 90 per cent. in amount of the creditors.

It is not denied that Robert M. Thompson duly carried out and performed all the terms of the agreement of compromise and the order of confirmation of January 25, 1915, and thereafter, and in accordance with the order of confirmation aforesaid, the bankrupts and the bankruptcy receivers conveyed all the bankrupt estate to John W. Jay, who thereafter duly transferred it to the Guaranty Trust Company as substituted trustee for the bankrupt estate.

On June 16, 1916, the Guaranty Trust Company began an action in the United States District Court for the Southern District of New York against the defendants herein to recover the sum of $91,467.57, alleged to be due from defendants to the firm of S. H. P. Pell & Co. on account of transactions conducted by that firm on the New York Cotton Exchange as the defendants' brokers.

On March 29, 1918, the defendants began an action in the court of common pleas for the county of Charleston, in the state of South Carolina, wherein the defendants resided, against the firm of S. H. P. Pell & Co., alleged to be formed of Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell, and Robert M. Thompson, to recover $1,500,000 damages for fraud perpetrated in and arising out of transactions had by the defendants with S. H. P. Pell & Co., while that firm was acting as their brokers in transactions on the New York Cotton Exchange. The liability of Robert M. Thompson in said action is placed on the ground of his being a general partner.

Robert M. Thompson, one of the plaintiffs herein, and who was the only defendant served with process in the South Carolina action, caused the action to be removed from the state court into the United States District Court, wherein it was understood to be pending when this case was argued in this court, and wherein, so far as we are informed, it is still pending.

In the suit, now under review in this court, the court below dismissed the bill.

Myers & Goldsmith, of New York City (Emanual J. Myers and Gordon S. P. Kleeberg, both of New York City, of counsel), for appellants.

William St. John Tozer, of New York City (William St. John Tozer, of New York City, of counsel), for appellees.

Before WARD and ROGERS, Circuit Judges, and KNOX, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). [1] Inasmuch as it appears that neither the plaintiffs nor the defendants reside within the Southern district of New York, the court below clearly was without jurisdiction of the suit, now under review, as an original action. But it is said that this suit is not brought as an original suit, but as a dependent and ancillary suit, which has direct reference to a matter already litigated in the bankruptcy proceedings in the District Court for the Southern District of New York relating to the firm of S. H. P. Pell & Co. and the several persons alleged to constitute that firm. In Street's Federal Equity Practice, vol. 2, § 1229, that writer says:

"It is a rule, subject to but one exception, that jurisdiction in an ancillary proceeding is supported by the jurisdiction of the court in the main, or principal cause. Hence the ordinary jurisdictional averments may be dispensed with in such a proceeding. If a court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit. Neither the citizenship of the parties, nor the amount in controversy, nor any other factor that would ordinarily determine jurisdiction, has any bearing on the right of the court to entertain that proceeding."

The one exception above referred to relates to an ancillary receivership, and with that we are not now concerned. The right of a federal court to sustain jurisdiction of an ancillary suit, without reference to the citizenship of the parties, was fully considered in Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145, which reviewed the authorities. And see Pacific Railroad of Missouri v. Missouri Pacific Railway Co., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498; Johnson v. Christian, 125 U. S. 642, 645, 8 Sup. Ct. 989, 31 L. Ed. 820; Carey v. Houston & Texas Central Ry. Co., 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638; Eichel v. United States Fidelity & Guaranty Co., 245 U. S. 102, 104, 38 Sup. Ct. 47, 62 L. Ed. 177.

The jurisdiction of a court over a particular subject-matter and that court's power to apply a remedy no doubt are co-extensive; so that demands which are ancillary to the main action may be taken cognizance of by the court and determined in aid of its authority over the principal matter, and a court may entertain proceedings ancillary to its judgment or decree, for the jurisdiction it originally acquired is not exhausted by the entry of the judgment, and the power is still in the court to issue all proper process and take all proper proceedings for the enforcement of its judgment. All this is familiar doctrine and well-established law.

[2] An ancillary suit may be maintained: (1) To aid, enjoin, or regulate the original suit. (2) To restrain, avoid, explain, or enforce the judgment or decree entered in the original suit. (3) To enforce or adjudicate liens or claims to property in the custody of the court in the original suit. (4) To prevent the relitigation in other courts of the issues heard and adjudged in the original suit, and to protect the titles and rights acquired under its judgment or decree from attack based on the theory that the adjudication in the original suit was illegal or in-

effective. Riverdale Cotton Mills v. Alabama & Georgia Manuf. Co., 198 U. S. 188, 25 Sup. Ct. 629, 49 L. Ed. 1008; Julian v. Central Trust Co., 193 U. S. 93, 112, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; Carey v. Houston & Texas Ry. Co., 161 U. S. 115, 126, 127, 16 Sup. Ct. 537, 40 L. Ed. 638; St. Louis & San Francisco Ry. Co. v. McElvain (D. C.) 253 Fed. 123, 128.

In Bates on Federal Equity Procedure, vol. 1, § 97, the doctrine is summarized as follows:

"A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits, and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or to assert any claim, right or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit."

[3] We do not question but that the District Court for the Southern District of New York may enforce and protect its jurisdiction as a court of bankruptcy, when appealed to by a supplementary or ancillary bill to enforce its orders, sustain its jurisdiction, and protect parties in the enjoyment of rights secured to them under its orders. This is so, not only where jurisdiction is reserved or still retained, but even afterwards, where the result would be a relitigation of the same subject-matter between the same parties. In re Swofford (D. C.) 180 Fed. 549.

But the difficulty with the maintenance of this suit is that it cannot be regarded as in any proper sense an ancillary suit. It was instituted upon the theory that the proceedings in the District Court for the Southern District of New York in the bankruptcy matter of S. H. P. Pell & Co. discharged Stephen H. P. Pell & Co., as a firm, and Stephen H. Pell, Charles A. Kittle, and Howland H. Pell, individually, from all claims against the firm of S. H. P. Pell & Co., and that it also discharged therefrom Robert M. Thompson. But this is to lose sight of the terms of the composition, which provided for the release of Thompson—

"from any and all liability to any creditor of S. H. P. Pell & Co. who shall assent hereto, on account of any connection of said Robert M. Thompson with said firm, or any transaction of said Robert M. Thompson by or through said firm."

The release of Thompson was to apply only to those who specifically assented thereto, and there is no allegation anywhere in the complaint in the present action that the defendants herein assented to the composition. An examination of the record of the former proceedings shows that Thompson was not adjudicated a bankrupt never filed schedules, and never made any offer of composition. The offer of

composition was an offer made by the two Pells and Kittle. Moreover, Thompson could not have offered a composition, as section 12 of the Bankruptcy Act expressly provides that a bankrupt shall not offer terms of composition—

"before he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and lists of his creditors, required to be filed by bankrupts. * * *"

An examination of the offer of composition made by the Pells and Kittle, and of the order confirming the same, discloses that in neither is any reference made to the question whether Thompson was a member of the firm of S. H. P. Pell & Co. as a general or special partner. There was no adjudication of that question in that proceeding. There was no adjudication in that proceeding on the subject-matter involved in the South Carolina action; and if the defendants here had appeared in that proceeding and opposed the composition, which they did not, they could not be enjoined from suing in another court. Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718. In the case cited the court holds that a creditor who had unsuccessfully opposed a composition and a discharge in bankruptcy on the ground of fraud in creating the debt, and accepted a dividend, and who then sued for the balance on the ground that the debt was excepted from the discharge, had not waived his right to sue on the tort by accepting the dividend; and the court also held that the granting of the discharge was not res judicata of the claim for the balance of the debt.

In the instant case the defendants, who have brought the South Carolina action, deny that they knew of the existence of their claims until long after the bankruptcy proceedings. Their allegation is that they did not know that they had been defrauded by S. H. P. Pell & Co. until some time after July 1, 1916. The order of confirmation of the composition agreement was entered on January 25, 1915. The allegations of fraud contained in the complaint in the South Carolina action may be found in the margin.[1]

[1] "That in the course of the employment of defendants by plaintiffs aforesaid, plaintiffs sent to defendants certain orders for the purchase and sale of cotton as aforesaid, which defendants agreed and promised to execute upon the said New York Cotton Exchange. That defendants not only neglected, failed, and omitted so to execute the said orders, but falsely and fraudulently stated, reported, and represented to plaintiffs that the said orders had been duly executed upon the said Exchange, and in accordance with the by-laws, rules, and regulations thereof, and falsely and fraudulently charged plaintiffs' account with such sums as would have been advanced by defendants, and with such sums as would have been earned by defendants, if said orders of plaintiffs had in fact been so executed by defendants as by them falsely and fraudulently stated, reported, and represented to plaintiffs.

"That from time to time during said period said defendants rendered to plaintiffs various statements wherein defendants falsely and fraudulently charged plaintiffs with the purchase price of about one hundred and fifty-seven thousand (157,000) bales of cotton in the amount of approximately ten million one hundred and ninety-three thousand nine hundred and ninety dollars ($10,193,990), and by said statements falsely and fraudulently represented to plaintiffs such cotton to have been purchased by defendants for plaintiffs' account in accordance with plaintiffs' instructions and with the by-laws, rules, and regulations of the said New York Cotton Exchange, and thereby falsely and

The South Carolina action is based on fraud and deceit, and is of such a nature that the tort claim it asserts was not provable in bankruptcy, even if the plaintiffs in that action had known of the facts of the claim in time to have asserted them in the bankruptcy proceedings. Whether the tort might have been waived and a provable claim in bankruptcy made, based on an implied contract, if the facts had been known, we need not consider, as the allegation is that the facts were not known, and, if not known, no such course could have been adopted. And section 17 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9601]) declares that—

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud * * * while acting * * * in any fiduciary capacity."

And the fraud complained of was committed, it is alleged, while the defendants in the South Carolina action were employed by the plaintiffs in that action as cotton brokers to buy and sell cotton for the account and risk of the plaintiffs, and such fraud was in connection therewith.

The bill of complaint in the present suit is exceedingly complicated, and raises a number of questions which the court below did not find it necessary to determine, and which we do not find it necessary to determine. The court below found in the bill no ground for equitable intervention, even if all the allegations the bill contains be assumed as true. We are in full agreement with that court in believing that the bill is without equity. It was properly dismissed, and, being dismissed for want of jurisdiction, the decree is to be modified to provide that the dismissal is without prejudice.

Decree, as modified, is affirmed.

Judge WARD was present at the argument and participated in the subsequent discussion of the case and concurred in the result. He has not read this opinion, being temporarily absent from the country at the time it was prepared and filed.

fraudulently represented to plaintiffs that the amount of the purchase price thereof had been duly paid, laid out, and expended by defendants for and on account of plaintiffs, and that the amount of defendants' commissions charged to plaintiffs in said statements had been duly earned by defendants in and about the purchase and sale of the cotton so falsely represented to plaintiffs to have been purchased for their account and to be due and owing to defendants."

(256 Fed. 631)

THE STRATHEARN.*

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3140.

1. SEAMEN ⟹24—WAGES—RECOVERY.
   Act March 4, 1915, § 4 (Comp. St. § 8322), authorizing seamen to collect half their wages at ports of call after voyage commences, provided demand be not made before expiration of five days, etc., authorizes demand two days after calling at port, where over five days had elapsed since commencing voyage.
2. SEAMEN ⟹4—WAGES—FOREIGN SEAMEN.
   Act March 4, 1915, § 4 (Comp. St. § 8322), empowering seamen to collect half their wages at ports of call, and providing section should apply to seamen on foreign vessels while in American harbors, is applicable to British seamen shipped on British vessel in British port, while vessel is in an American harbor.
3. SEAMEN ⟹15—WAGES—RECOVERY IN AMERICAN PORTS—LEGISLATIVE POWER—FOREIGN CONTRACTS.
   Act March 4, 1915, § 4 (Comp. St. § 8322), empowering seamen to collect half their wages in American ports of call, is not invalid as rendering unenforceable in this country a wage contract lawfully made by foreigners in another country.
4. CONTRACTS ⟹101(1)—VALIDITY.
   A contract may be valid and enforceable where executed, but unenforceable in another jurisdiction.
5. CONSTITUTIONAL LAW ⟹307—DUE PROCESS—DENIAL OF REMEDY—SEAMEN—WAGE CONTRACT.
   Act March 4, 1915, § 4 (Comp. St. § 8322), empowering seamen to collect half their wages at American ports of call, does not unconstitutionally deprive a foreign vessel of contract rights without due process, because it renders unenforceable in American ports a wage contract lawfully entered into abroad.

Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Libel by John Dillon against the Strathearn Steamship Company, claimant of the steamship Strathearn. From a decree dismissing the libel (239 Fed. 583), the libelant appeals. Reversed.

Silas Blake Axtell, of New York City, L. W. Nelson, of St. Augustine, Fla., and W. J. & H. W. Waguespack, of New Orleans, La., for appellant.

J. E. D. Yonge, of Pensacola, Fla. (W. A. Blount, A. C. Blount, Jr., and F. B. Carter, all of Pensacola, Fla., and Ralph Jas. M. Bullowa, of New York City, on the brief), for appellee.

Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, specially appearing on behalf of the British vice consul at Pensacola, Fla., as amicus curiæ.

Before WALKER and BATTS, Circuit Judges, and BEVERLY D. EVANS, District Judge.

WALKER, Circuit Judge. [1] This is an appeal from a decree dismissing the libel of the appellant, John Dillon, against the British steamship Strathearn, to recover the wages the libelant had earned

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari granted 250 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

as a carpenter on that ship prior to the date of his demand from the master of the ship, made two days after its arrival in the port of Pensacola, where the ship delivered cargo, of one-half part of the wages he had earned, which demand was not complied with. The action of the court was the result of its conclusion that the demand was prematurely made, having been made within less than five days after the arrival of the ship at the port where the demand was made, though no such demand had previously been made, and the appellant's service and the ship's voyage had begun several months before. The Strathearn (D. C.) 239 Fed. 583. The following is the provision of the statute:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full wages earned. * * * And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." Act March 4, 1915, c. 153, § 4, 38 Stat. 1165 (Comp. St. § 8322).

The provision that "such demand shall not be made before the expiration of, nor oftener than once in five days," is not to be given the effect of requiring that five days must have elapsed after the arrival of a ship at a port where it loads or delivers cargo before a demand for half wages can be made with the effect given to it by the statute. Evidently the intention was that such a demand should not have the effect given to it by the statute if it is made within five days "after the voyage has commenced," or if made sooner than five days after the making of a previous demand contemplated by the statute. The appellant's demand was not premature.

The decree appealed from is sought to be sustained on other grounds, of which mention will be made:

[2] It is contended that the appellant was not within the terms of the statute, because he was a British subject, who shipped on a British vessel in a British port. There is nothing to indicate that the word "seaman," in the clause "that this section shall apply to seamen on foreign vessels while in harbors of the United States," etc., was intended to include only seamen of this country, or that that clause was intended to have the same meaning it would have had if, instead of the word "seamen," the words "American seamen" had been used. Another clause in the same sentence, "and the courts of the United States shall be open to such seamen for its enforcement," makes it quite plain that foreign seamen are within the provision. It cannot be supposed that the last-quoted clause would have been inserted, if only seamen of this country had been in contemplation. Legislation was not needed to open the courts of the United States to them. Provisions of the act looking to the abrogation of treaties containing provisions inconsistent with it are indicative of the legislative intention to make such provi-

sions as the one in question applicable to foreign seamen while in the ports of the United States. The circumstance that the title of the act shows that a part of its purpose was "to promote the welfare of American seamen in the merchant marine of the United States" is not indicative of an intention to make the provision in question applicable to American seamen only. It well may have been regarded that competition of American seamen in foreign ports with foreign seamen for service on foreign vessels would be hampered, if in American ports only American seamen had the right given by the provision in question, so that on that ground the services of foreign seamen would be preferred by foreign vessels destined to American ports.

[3, 4] By the articles signed by the libelant in Great Britain he agreed to serve on a voyage not exceeding three years' duration to any port or places within designated limits, which included ports of this country, for stated wages, which, less advances made, were payable on completion of the agreed service, which had not been completed when the demand for half the wages earned was made. In behalf of the appellee it is contended that if the provision in question is so construed as to be applicable to the case at bar, it is invalid on the ground that it is one not within the legislative power of the United States to make, in that it undertakes to nullify contracts entered into between foreigners in a foreign jurisdiction, in which such contracts are valid and enforceable. The enforcement of the provision in question in behalf of a foreign seaman situated as the appellant was does not have that effect. From the fact that a contract is valid and enforceable in the jurisdiction in which it was made, it does not follow that it is effective to govern the relations of the parties to it while they are in another jurisdiction with the law or public policy of which it is in conflict. A contract may be valid and enforceable where it was made, and yet be unenforceable in another jurisdiction. Union Trust Co. v. Grosman, 245 U. S. 412, 38 Sup. Ct. 147, 62 L. Ed. 368; The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190. The fact that the seaman and the vessel are British does not prevent the American law being applicable to them while both are in an American port. Patterson v. Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002.

The shipping contract would be given the effect of contravening a law of the United States if it were permitted to prevent the acquisition and exercise of a right given to "seamen on foreign vessels while in harbors of the United States" by a statutory provision the terms of which make it plain that the right is given notwithstanding any contract stipulation to the contrary. The statute in question is not given an extraterritorial operation by according to it the effect of preventing the existence of a contract made in another jurisdiction from depriving a seaman who is a party to such contract of a right given to him by statute while both the seaman and the ship are within the territory of the nation the law of which gives the right. The foreign contract does not prevent the relations of the parties to it being governed by the law of the place where the seaman and the ship are. The law of the place where the contract was made would be given an ex-

traterritorial operation if it is allowed to determine the question of the enforceability of the contract in another jurisdiction, the law of which forbids the enforcement of such a contract.

[5] Another suggestion is that, if the provision in question is held to be applicable to the facts of this case, it is violative of the Constitution of the United States, in that it deprives a party of contract rights without due process of law. The statute does not purport to affect, and does not affect, the rights of the parties under a contract made in a foreign jurisdiction, except to prevent such contract standing in the way of the enforcement of the domestic law in behalf of and against parties who have subjected themselves to the domestic jurisdiction. "It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement." Wildenhus' Case, 120 U. S. 1, 11, 7 Sup. Ct. 385, 387 (30 L. Ed. 565). A contract made in Great Britain for the services of a British seaman on a British vessel which goes to an American port is not so far effective as to be enforceable in the latter place, if its enforcement there would result in setting at naught the law of that place. As the foreign contract is incapable of giving the right claimed by virtue of it, the statute in question cannot properly be regarded as depriving a party to the contract of a right under it; the right claimed not being one which was conferred by the contract or otherwise. The obligation of a contract entered into in one jurisdiction does not extend so far as to entitle the parties to such contract to be exempt from the operation of the law of another jurisdiction to which they subject themselves, which law forbids such effect being given to the contract as is sought to be given to it in that jurisdiction. In our opinion the provision in question is not invalid on either of the grounds urged against it.

The court erred in dismissing the libel.

The decree appealed from is reversed.

(256 Fed. 635)

LASWELL v. HUNGATE et al.

(Circuit Court of Appeals, Seventh Circuit. December 19, 1918.)

No. 2620.

1. CHARITIES ⟹36—DEVISE TO FREE SCHOOL—CHARGING TUITION AGAINST NONRESIDENT.

Any of the so-called "free" schools of a city, established under the public school laws of the state, for which Const. Ill. art. 8, § 1, and Hurd's Rev. St. Ill. 1917, c. 122, § 127, call, satisfies a devise for support of "a school in said city the tuition of which school shall be free," "such free school as said [city] council shall see fit," though under section 115 tuition is required of nonresident pupils.

2. CHARITIES ⟹37—GENERAL CHARITABLE INTENT—CY PRES DOCTRINE.

General charitable intent, making applicable the cy pres rule, were there no existing school to which the devise were applicable, *held* shown by devise for support of "a school" in a city, "the tuition of which shall be free," "such free school as said [city] council shall see fit," with declaration, "I have made the gift for the benefit of the young * * * and do not wish them to lose the benefit of the gift by the neglect of others."

3. CHARITIES ⟹18—WANT OF TRUSTEE—JUDICIAL APPOINTMENT.

A charitable trust will not fail for want of a trustee, or inability of party named to act, but chancery will designate another trustee.

4. CHARITIES ⟹20(5)—DESIGNATION OF BENEFICIARY BY CITY.

Even if a city cannot act as trustee of property devised for support of a school in the city, it may, as contemplated by the devise, designate the school to be supported.

5. CHARITIES ⟹38—PERPETUITIES ⟹4(4)—REQUEST IN CHARITABLE GIFT.

Mere request, in will making devise for support of a school in a city, that the city keep testator's family burial lot in repair, imposes no obligation, much less creates a perpetuity, and so does not affect validity of charitable gift.

6. CHARITIES ⟹23—VALIDITY—POSSIBILITY OF MISUSE.

A devise for support of a free school to be designated by a city is not invalid, on the theory that it leaves the city free to designate a school whose teachings are contrary to public policy, as not only must it be presumed that it will properly discharge its duty, but, if it should fail therein, the courts could lend their aid.

Appeal from the District Court of the United States for the Southern Division of the Southern District of Illinois.

Suit by Clara M. Laswell against John Hungate, executor of Benjamin F. Johnson, deceased, and others. Bill dismissed, and plaintiff appeals. Affirmed.

The appeal is from a decree of the District Court dismissing appellant's bill for want of equity appearing upon its face. It appears from the bill that Benjamin F. Johnson, of the city of La Harpe, Hancock county, Ill., died testate in 1906, leaving surviving his widow and one child, the appellant. He left property in Hancock county worth about $300,000, consisting of several thousand acres of land lying outside of the city.

His will, dated in 1895, provided:

(1) For payment of debts.

(2) Bequest of $100 to daughter.

(3) Devise to daughter for her natural life of a quarter section of land in Hancock county, with certain restrictions and limitations respecting payment of taxes and selling or mortgaging her interest.

(4) Bequest to grandson of a watch and $500.

(5) Bequest to his wife of household furniture and the like.

(6) Devise to wife during her natural life of the family residence at La Harpe and annual income of $1,000.

(7) Provision for fire insurance on the home and personal property.

(8) "None of my real estate is to be sold but rented out and my cash funds loaned on real estate security and the net annual income derived therefrom after paying the legacy to my wife Phebe Ann Johnson and all taxes, repairs, and other proper charges, is to be delivered to the city of La Harpe, Hancock county, Illinois, to be appropriated annually to the support of a school in said city the tuition of which school must be free."

(9) "And it is my will and I hereby direct that on the death of my said wife, Phebe Ann Johnson and my said daughter Clara May Bishop or either of them, the property or funds the deceased had a life interest in, together with all accumulations and any and all other property I may leave not disposed of by the previous provisions of this will shall be delivered to the city of La Harpe, Hancock county, Illinois, to be held (and owned) by said city forever in trust to create and establish a fund to be appropriated the annual income thereof to the support of a school in said city the tuition of which school must be free. The city council of said city managing such funds and estate and paying the annual income to the support of such free school as said council shall see fit. My real estate is not to be sold but rented out and my cash funds loaned on real estate security."

(10) "I hereby constitute and appoint John H. Hungate executor of this my last will, and also trustee to hold, manage and control my estate real and personal and the increase and accumulation thereof until the time arrives as herein limited to vest said real estate in the city of La Harpe, and I direct that the court having jurisdiction of the probating of this will shall require of the trustee such bonds as shall be adequate to protect and preserve the estate and in case of the death or refusal to act of said trustee, then the master in chancery of Hancock county, Illinois, may be appointed his successor under this will."

The codicil, dated in 1897, provides:

"I hereby direct that the taxes and repairs and painting needed on the premises in the said city of La Harpe, county and state aforesaid, which I have willed to my wife Phebe Ann during her natural life is to be paid from the income from my estate and should the buildings be damaged or destroyed by fire or otherwise they are to be repaired or replaced the same as they are with the exception of the barn, if that is destroyed it need not be rebuilt."

"Also any and all leases which I may make which have not expired by their own limitations at the time of my death are to be in full force and effect until they expire by their own limitations."

"And I hereby request the said city of La Harpe through their proper officials to see that my family lot in the graveyard and the stones and monuments thereon are kept in a proper state of repair in consideration of my gift to the said city, but there is no penalty attached if they fail to do so, as I have made the gift for the benefit of the young who are to take their place as men and women in the world and do not wish them to lose the benefit of the gift by the neglect of others."

The will and codicil were duly admitted to probate.

The bill sought to have declared void the eighth and ninth clauses of the will, whereunder the bulk of the testator's property is devised in trust for the support of a school as stated in said clause.

Thomas E. D. Bradley, of Chicago, Ill., for appellant.

D. E. Mack, of Carthage, Ill., and John Hungate, of La Harpe, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] The main ground for the claimed invalidity of clauses 8 and 9

is that there was no school in La Harpe such as is described in these clauses, viz. a school in said city, tuition in which school must be free, and that there is no provision in the will for founding, but only for supporting, a school; that the will and codicil discloses no general charitable intent of the testator whereunder the cy pres doctrine may be invoked, and the devise therefore must fail.

From the bill it appears that there were so-called public schools in La Harpe; indeed, the president and members of the board of education of that city are as such made parties to the bill. It is maintained, however, that under the laws of Illinois the public schools of the state are not schools in which tuition is free, but that these schools are primarily available only to pupils within the school district, that others desiring the benefit of the schools must pay tuition.

One of the institutions upon which we in this country pride ourselves is the system of free schools. It is evident that such schools are not self-sustaining, but funds must be provided to maintain them. This is ordinarily done by public taxation. In making practical provision for public free education each school unit—usually a school district—provides buildings and facilities for the reasonably necessary requirements of the particular unit to be served, but not accommodations in one district sufficient for the world at large. Where, however, it can be done without prejudice to resident pupils, nonresident pupils may be admitted and tuition may be collected from them. Chapter 122, § 115, Rev. Stat. Ill. But these schools are not any the less public or "free" schools in any reasonable application of these terms, or schools in which the tuition must be free, because the educational facilities they afford may be extended to nonresidents and tuition required of such.

If, instead of employing the expression "a school in said city the tuition of which school must be free," the testator had said "a free school of the city," it would hardly be questioned that a public school of the city was within his contemplation. Under the subject of "Powers and Duties of Boards of Education" the Illinois statutes provide:

> "First, to establish and support free schools for not less than six nor more than ten months in each year." Chapter 122, § 127, Rev. Stat. Ill.

In the latter part of the ninth clause of the will, referring again to the same object of his benefaction as before referred to, the testator employed the expression "support of such free school as said council shall see fit." Surely the testator should not be held to greater particularity of description or expression than is employed in the statutes of his state whereunder the city of his residence maintained free schools. This statute was enacted in pursuance of the constitutional provision that—

> "The General Assembly shall provide a thorough and efficient system of free schools whereby all children of this state may receive a good common school education." Section 1, art. 8, Constitution of Illinois 1870.

Neither the constitutional nor the statutory provision for free schools contemplated that each such school must be free in the sense contended for by appellant, viz. a school wherein tuition shall be free for the whole world.

It is apparent that the testator did not intend to bind the city to limit the benefit of the devise to any particular school. He used twice the expression "a school in said city," employing the indefinite article, and this, with the words "such free school as the council shall see fit," manifests an intent to lodge in the city a discretion as to the school, limiting the benefaction to a school or the pupils of a "school wherein the tuition must be free," or a "free school," but not excluding schools at La Harpe established under the public school laws of the state of Illinois.

[2] But, if appellant's contention in this regard were sound, would not the equitable doctrine of cy pres apply here, so that the devise would in any event be sustained? The doctrine is so well stated in Story's Equity Jur. § 1169, that it may with profit be here quoted:

"Another principle equally well established is, that if the bequest be for charity it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are in esse or not, or whether the bequest can be carried into exact execution or not, or whether the legatee be a corporation capable in law of taking or not, for in all these and the like cases the court will sustain the legacy and give it effect according to its own principles; and where a literal execution becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the general purposes, or as (as the technical expression is) cy pres."

This very statement of the law has been definitely and repeatedly upheld by the Supreme Court of Illinois. Kemmerer v. Kemmerer, 233 Ill. 327, 84 N. E. 256, 122 Am. St. Rep. 169; Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; Heuser v. Harris. 42 Ill. 425.

That the law is as thus stated is not controverted, but it is contended that the devise is of specific nature, not charitable, and does not show a general charitable intent on the part of the testator, and that therefore the cy pres doctrine does not apply. The absence of limitation upon the city beyond the indication that the school shall be free, and the broad general discretion granted it, point strongly to a general intent of the testator to devote his property to charitable purposes. But if this alone were not sufficient, in our judgment the concluding words of the codicil leave no room for doubt as to his general intent to create a charity, when he says:

"I have made the gift for the benefit of the young who are to take their place as men and women in the world and do not wish them to lose the benefit of the gift by the neglect of others."

In this statement of his broad and beneficent purpose there may clearly be read an intent that the gift should not be defeated through strained construction of his phrases, or even through the casual employment of inept words. The limitation of the benefaction to the support of a school, and that a school in which tuition must be free, does not so specifically define and circumscribe the devise as to indicate absence in the donor of a general charitable intent. Vidal v. Girard, 2 How. 127, 11 L. Ed. 205; Perin v. Carey, 65 U. S. 465, 16 L. Ed. 701; Ould v. Washington Hospital, 95 U. S. 303. 24 L. Ed. 450; Russell v. Allen, 107 U. S. 164, 2 Sup. Ct. 327, 27 L. Ed. 397; Sickles v. City of New Orleans, 80 Fed. 868, 26 C. C. A. 204.

It is contended that the clauses provide, not for founding or institut-

ing a school, but only for "support," and that, as the public schools are not intended, the devise must fail for want of an existing school which might be the object of the support. If the testator did not intend a public school to be the beneficiary, and, as stated in the bill, there were then no other schools in the city to which the support might be applied, what could he have intended by the devise? He surely knew the facts; and unless there be imputed to him the intent that his devise should defeat itself for want of an already existing free school in the city, we are not at liberty to give the word "support," as used in the clauses, the narrow and limited construction contended for. On the contrary, the very nonexistence of any such a school would seem only to emphasize our conclusion that the clauses manifest intent of the testator that, in the discretion of the council, the fund be applied to any free school in the city, whether then existing or afterwards brought into being, and whether created or founded wholly or in part out of or as a result of the testator's benefaction, or otherwise. But, aside from this, if the fact were that there was then no existing school to which the devise was applicable, this would serve only to make the more apparent the donor's general charitable intent, and the more certainly would apply the cy pres rule.

[3, 4] It is contended that the city has not the power to take and hold this property or the income, for any such purpose. It is a sufficient reply that a trust will not fail for want of a trustee. If the city cannot act as trustee, a court of chancery will designate another trustee. Even though the city could not take or hold this property or the income from it, we perceive no reason wherefore it may not, as contemplated by the devise, designate the school in whose support the trust fund shall be administered.

[5] As to the contention of invalidity of these clauses because in the codicil the income is to be applied in part, without the designation of what part, to the perpetual maintenance of the family burial lot of the testator, the codicil itself supplies the answer. It creates no such charge on the estate or obligation on the trustee, but expressly negatives any such conclusion. The codicil merely requests the city to see that the lot and monument are kept in proper state of repair. It would seem that, as though in anticipation of such line of attack, he specified, "but there is no penalty attached if they fail to do so." Of course the term "penalty" is not thus used as relating to a fine, imprisonment, or the like, but as indicating the absence of any obligation to comply with the request, and the clear intent and purpose that the charity shall be in no wise thereby periled or penalized. The clause does not assume to impose an obligation, must less to create a perpetuity.

[6] Nor is there merit in the point that, the devise failing to designate the kind of school to be supported, the city might designate some school whose teachings are contrary to public policy. We cannot anticipate that the support will be extended to schools for teaching vice or crime or conceded immorality, if indeed such could be said to come within the designation of "school." It must be presumed that the city will properly discharge its duty; but, if it should fail in this through a perversion of the trust fund from its beneficent and chari-

table purpose, the courts would doubtless deal with such a situation to the end that the true aims and purposes of the devise might be effectuated, not destroyed.

The charge that the city has abandoned the property and the trust is not supported by any facts stated in the bill from which such conclusion would flow. With the menace of litigation continually before it, first a contest of the will, which failed, then this suit to invalidate the trust clauses, the city has so far been in no situation to carry out the testator's charitable intent. Whatever might be the consequences of abandonment by the city, abandonment does not appear.

The decree of the District Court is affirmed.

(256 Fed. 640)

COCO-COLA CO. v. MOORE et al.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1919.)

No. 5205.

1. APPEAL AND ERROR ⟹758(1)—NOTICE OF ERROR NOT SPECIFIED—PRESUMPTION AS TO EXAMINATION OF RECORD.

If the Circuit Court of Appeals concludes to notice a manifest error not specified according to rule No. 24 (188 Fed. xvi, 109 C. C. A. xvi), there is no implication that it has undertaken the task of going through the record and examining other errors not specified.

2. ATTORNEY AND CLIENT ⟹166(3)—ACTION FOR COMPENSATION—EVIDENCE.

In suit for compensation as attorneys in defendant company's suit to restrain unfair trade competition by another firm, plaintiffs' evidence of the amount of business done by defendant company in the United States generally was properly admitted, not to show defendant's ability to pay, but as bearing on the results obtained by the litigation.

3. EVIDENCE ⟹142(5)—SIMILAR FACTS—VALUE OF ATTORNEYS' SERVICES.

In an action by attorneys for compensation for services rendered defendant company in its suit to restrain unfair competition, defendant's evidence as to the compensation which it had paid attorneys in other actions was properly ruled out, as opening the door to the admission of collateral issues, and also as possibly based on specific contracts.

4. EVIDENCE ⟹487, 543(2)—OPINION OF LAYMEN—VALUE OF LEGAL SERVICES.

The officers of a corporation which employed attorneys to conduct a suit to restrain unfair trade competition were not qualified as laymen to express an opinion as to the reasonable value of the services of counsel, for such evidence can be given only by members of the bar.

5. EVIDENCE ⟹543(2), 572—EXPERT OPINION—VALUE OF ATTORNEYS' SERVICES—QUALIFICATIONS OF OTHER ATTORNEYS.

In an action by attorneys to recover for professional services rendered defendant company in conducting a suit to restrain unfair trade competition, evidence of attorneys who had not had experience in trade-mark or unfair competition cases was admissible on behalf of plaintiff attorneys; objection that such witnesses were not qualified going to the weight, and not the admissibility, of the evidence.

6. EVIDENCE ⟹543(2)—EXPERT OPINION—ATTORNEY'S FEES IN UNFAIR COMPETITION CASE.

In an action by attorneys for services rendered defendant company in suit to restrain unfair trade competition by another firm, testimony of three lawyers, experts in the field of trade-mark and unfair competition, and possessed of large experience in courts where such litigation is

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carried on, was admissible on behalf of defendant company, though the attorneys knew nothing about the customary fees charged at the local bar of the small city where the case was tried.

7. CUSTOMS AND USAGES ⟹12(1)—EFFECT ON CONTRACT—KNOWLEDGE OF PARTIES.

In suit on an implied contract, a local custom cannot be given controlling force, unless shown to have been known to and contemplated by the parties at the time the services were rendered.

In Error to the District Court of the United States for the Eastern District of Arkansas; Frank A. Youmans, Judge.

Action by John M. Moore and others against the Coco-Cola Company. To review judgment for plaintiffs, defendant brings error. Reversed, with directions to grant new trial.

Elias Gates, of Memphis, Tenn. (Samuel Frauenthal, of Little Rock, Ark., on the brief), for plaintiff in error.

Charles C. Reid, of Little Rock, Ark., for defendants in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The plaintiffs, Moore et al., sued defendant, Coco-Cola Company, to recover compensation as attorneys. The case has been here before, and was reversed because of improper rulings on questions of evidence. 246 Fed. 942, 159 C. C. A. 214. It was again tried and comes here now upon the same class of errors, namely, rulings upon the receipt or rejection of evidence.

[1] On the former review the brief of the plaintiff in error, the Coco-Cola Company, contained no specification of the errors relied upon, as required by our rule 24. 188 Fed. xvi, 109 C. C. A. xvi. Notwithstanding this omission we decided to notice a manifest error of so grave a character that we thought it ought not to be passed by, notwithstanding the failure to comply with the rule. It is now insisted that as to all questions involved in the former record as to which we expressed no opinion, our silence should be interpreted as a holding that we had examined them and found them to be without merit. There is no justification for this inference. If a court concludes to notice a manifest error not specified according to the rules, there is no implication that it has undertaken the task of going through the record and examining other errors which had not been specified. We will therefore proceed to consider the errors which have been properly specified on the present review.

[2] Plaintiffs offered evidence of the amount of business done by the defendant in the United States generally, and it was received over defendant's objection. The ruling was proper. The evidence was not offered for the purpose of showing defendant's ability to pay, but as bearing upon the results obtained by the litigation. The original suit was brought to restrain unfair trade competition by the firm of Butler Bros., and a decree was obtained restraining them from the practices complained of. This decision had great value to the com-

pany, regardless of the amount of damage inflicted by the wrongful conduct of Butler Bros. It established the company's trade rights, and was an important precedent condemning the practices of all who infringed those rights. While the decree would not be res adjudicata as against other wrongdoers, its effect in the business world would be highly beneficial. The result is akin to a decree in a patent case sustaining the patent, and adjudging a defendant guilty of infringement. The amount involved in the particular case may be insignificant, but the decree sustaining the patent, and condemning the infringement is of great value in other jurisdictions where the injury to the patentee's right may involve large values.

[3, 4] Defendant offered evidence as to the compensation which it had paid to attorneys in other actions. This evidence was properly ruled out. It could not have been received without giving right to an inquiry into all the suits in which the services were performed. That would have involved the case upon trial in collateral issues. The compensation also may have been based upon specific contracts, and would thus be wholly irrelevant in determining what was the reasonable value of services rendered upon quantum meruit. It is likewise true that the defendant's officers were not qualified as laymen to express an opinion as to the reasonable value of the services of counsel. Such evidence can only be given by members of the bar. Howell v. Smith, 108 Mich. 350, 66 N. W. 218; Hart v. Vidal, 6 Cal. 56; Chamberlayne on Evidence, § 2163.

[5] Plaintiffs offered evidence of attorneys who had not had experience in trade-mark or unfair competition cases. This was objected to upon the ground that such attorneys were not qualified to give opinions as to the reasonable value of attorney's fees in such litigation. The court overruled the objection, and received the evidence. The ruling was proper. The objection went to the weight of the evidence, and not to its admissibility. When the nature of the action, the time devoted to it, the amount involved, the results obtained, and other like factors proper for consideration in fixing the compensation of attorneys, are stated, any member of the bar, in good standing, may testify as an expert as to what would be a reasonable compensation for the services performed, although the witness has never had experience in the same field of litigation. Such experience would add to the weight of his evidence, but the want of it does not render his opinion incompetent.

[6, 7] Defendant offered the evidence of three lawyers, one from New York, one from Chicago, and one from Washington. They were experts in the field of trade-mark and unfair competition, and possessed of large experience in courts where such litigation is in the main carried on. They knew nothing about the customary fees charged at the local bar of Little Rock, Ark., where the case was tried, in which plaintiffs rendered the services sued for. The evidence was objected to on the ground that the witnesses were not shown to be familiar with the fees charged at Little Rock, and for that reason were disqualified. The objection was sustained. We think the ruling was erroneous and highly prejudicial. There had been little, if any, litigation in unfair competition cases at Little Rock. No cus-

tomary fee for such services had been established there as the result of experience. It is well know that litigation of this kind is mainly confined to large commercial centers. It has come to be regarded as a distinct branch of the law, and, like patent law, is largely in the hands of a distinct class of practitioners. Litigation of this kind is national, and not local. To confine testimony in such a case to what is usual in the community is simply to deny one of the valuable sources of information. Knowledge of the usual compensation paid for such service can only be learned from those who live in the centers where such litigation is most frequent, and to deny a litigant the right to produce the testimony of persons having that kind of qualification is to substitute theory for experience. It is claimed that the ruling is based upon Ward v. Kohn, 58 Fed. 462, 7 C. C. A. 314. Such a view divorces the opinion from its facts. The services sued for there were rendered in a criminal case at Louisville, Ky. The reasonableness of plaintiffs' compensation had been testified to by eminent members of the bar of that city. Defendant offered evidence of lawyers residing in Little Rock, Ark., who had no knowledge of the usual fees in Louisville. This evidence was excluded, and what is said in the Ward Case is based upon the remoteness geographically of the two cities, and the wide difference in the fees of lawyers in what was then a provincial town like Little Rock, as compared with the usual compensation in a large commercial city like Louisville. The language of the opinion cannot be separated from the facts of the case. Northern Pacific Ry. Co. v. N. A. Tel. Co., 230 Fed. 347, 355, 144 C. C. A. 489, L. R. A. 1916E, 572; King v. Pomeroy, 121 Fed. 287, 294, 58 C. C. A. 209. Here the litigation is entirely different. It is not local, but national, and is conducted mainly by specialists, and their judgment is the best evidence as to what is reasonable compensation for such services. We do not understand that the decision in Ward v. Kohn was intended to limit testimony to lawyers of the particular city in which the services were rendered. There would be distinct objections to such a rule. When plaintiffs are eminent members of the bar, their brethren of the same bar are reluctant to give evidence against them in a suit for their compensation. Esprit du corps is a factor in such cases which courts cannot disregard. In the medical profession it is considered unprofessional for one doctor to testify against another in civil litigation. If the defendant in the Kohn Case had offered evidence of members of the bar in Cincinnati, Ohio, or Nashville, Tenn., or possibly St. Louis, Mo., who showed themselves to be familiar with the usual compensation paid for services, such as the plaintiffs were suing for, and the evidence had been rejected because the witnesses were not members of the Louisville bar, it would probably have been error to exclude the evidence. In suits on implied contract a local custom cannot be given controlling force unless it is shown to have been known to and contemplated by the parties at the time the services were rendered. Bowling v. Harrison, 6 How. 248, 12 L. Ed. 425; Chicago, Milwaukee & St. P. Ry. Co. v. Lindeman, 143 Fed. 946, 949, 75 C. C. A. 18. In this day of mobile judges and lawyers, the bar of a city cannot establish a market

overt for professional services and require all comers to take notice of their local customs.

The judgment is reversed, with directions to grant a new trial.

(256 Fed. 644)

BARNETT et al. v. KUNKLE et al. *

(Circuit Court of Appeals, Eighth Circuit. March 8, 1919.)

No. 5200.

1. REFORMATION OF INSTRUMENTS ⟹17(1)—MISTAKE—INTEREST IN LAND.
   A mutual mistake as to the interest of the grantor in the land is a mistake of fact, not of law, though induced by a mistaken view of the law.

2. REFORMATION OF INSTRUMENTS ⟹20—FRAUD OF GRANTEE—INTEREST CONVEYED.
   Where an Indian, who could not read English, mistakenly believed that he had only a one-half interest in the land conveyed, and was confirmed in that belief by statements of the grantee, equity will grant relief to the grantor from a deed conveying the entire estate.

3. REFORMATION OF INSTRUMENTS ⟹16—INTENT OF PARTIES—INTEREST CONVEYED.
   Where both parties to a deed believed that the grantor owned only a one-half interest in the land, and the grantee informed the grantor, who could not read English, that the deed conveyed only a one-half interest, the grantor is entitled to relief against the deed, which in terms conveyed the entire interest in the land.

4. EQUITY ⟹262—MOTION FOR JUDGMENT ON PLEADINGS.
   Where a grantor is entitled to have a deed conveying a tract of land reformed, because of mutual mistakes and misrepresentations by the grantee, so as to convey only a one-half interest, a cross-bill in a suit to quiet the title by subsequent grantees, who were also grantees from the alleged husband of grantor's daughter, alleging that the daughter was not legally married, so that the grantor inherited the entire interest, raised an issue of fact, and it was error to give judgment against him on the pleadings.

5. EQUITY ⟹262—JUDGMENT ON PLEADINGS.
   In a suit to quiet title, where the defendants filed a cross-bill to reform a deed, answers to the cross-bill, alleging plaintiffs to be bona fide purchasers, allege an affirmative defense, which must be proved, and do not entitle plaintiffs to judgment on the pleadings.

   Hook, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by W. A. Kunkle and others against Tucker Barnett and others to quiet title to land. Decree for plaintiffs, and defendants appeal. Reversed, with directions.

Lewis C. Lawson, of Holdenville, Okl., for appellants.

A. A. Davidson, of Tulsa, Okl. (P. C. West, R. S. Sherman, Grey Moore, and J. A. Veasey, all of Tulsa, Okl., and John B. Patterson, of Okemah, Okl., on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 24, 1919.

AMIDON, District Judge. Annie Bird, a full-blood Creek citizen, died in September, 1909, intestate and without issue, seized of the lands in controversy as her allotment. She left surviving her Tucker Barnett, her father, an alleged husband, Jimmie Bird, with whom she had lived for years, and a sister, Maggie Harjo.

January 26, 1910, Tucker Barnett conveyed the land by warranty deed to one Lake Moore, under whom plaintiffs claim.

On January 11, 1913, Jimmie Bird, the alleged husband of Annie Bird, conveyed the land by quitclaim deed to one Litchfield, from whom plaintiffs afterwards obtained title.

This suit was brought by plaintiffs Kunkel and the Prairie Oil & Gas Company against Tucker Barnett, Maggie Harjo, and others to quiet their title to the land. Defendants answered, and also filed a cross-bill, setting up claims to the land as heirs of the allottee, and alleging that Jimmie Bird was not her lawful husband, because at the time of his marriage to her, and at the time of her death, he had a former wife living from whom he had not been divorced. They also alleged that the estate of Annie Bird was an inheritance from her parents, who were duly enrolled citizens of the Creek Nation, and therefore the land reverted to them in equal shares, under the rule in Shulthis v. McDougal, 170 Fed. 529, 95 C. C. A. 615; so that Tucker Barnett, the father, would take a half interest, and the other half would pass to Maggie Harjo as the sole lineal heir of her mother, to whom it would have passed if the mother had been living.

The cross-bill also alleged that the deed from Barnett to Moore was void, because it conveys the entire estate, when it was the intent of Barnett that it should convey only a half interest. It is charged that Moore, at the time the deed was executed, expressly represented to the Indian that he owned only a half interest and that the deed conveyed only a half interest, and that the Indian was unable to read and had no independent advice, but acted wholly upon Moore's statement.

To this cross-bill complainants filed answers setting up, among other things, that they were bona fide purchasers for value.

On the case being called for trial, plaintiffs moved for judgment on the pleadings, which motion was sustained, and a decree entered dismissing the cross-bill on the merits, and establishing plaintiff's title. To review that decree defendants bring the present appeal.

The case was greatly complicated at the time the pleadings were drawn, and the trial had in the lower court, by uncertainty as to whether the inheritance from Annie Bird was controlled by the rule in Shulthis v. McDougal, 170 Fed. 529, 95 C. C. A. 615, or by the statute of inheritance of Oklahoma. Section 8418 of the Revised Laws of Oklahoma for 1910. Since the decree here under review was made, that uncertainty has been settled by the decision of the Supreme Court in Jefferson v. Fink, 247 U. S. 288, 38 Sup. Ct. 516, 62 L. Ed. 1117. It is there held that the inheritance is controlled by the statute of Oklahoma, which provides as follows:

"If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or, if he leave both father and mother, to them in equal shares. * * *

If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares."

Under this statute, if Jimmie Bird was the husband of Annie Bird, the inheritance passed one-half to him and one-half to the father, Tucker Barnett. If Jimmie Bird was not her husband, then the entire estate passed to Tucker Barnett.

Under this law Maggie Harjo took no interest in the property, and is out of the case, except to the extent that her asserted interest at the time the deeds were made may be considered in determining the belief under which Moore and Barnett acted at the time the deed was signed.

Under the decision in Jefferson v. Fink, Barnett was the owner of the entire estate, in case Jimmie Bird was not the lawful husband of Annie Bird at the time of her death. Whether he was such husband involves an inquiry into questions of fact, and possibly as to what law controls in determining family status among the Indians of Oklahoma. Barnett was entitled to a trial upon that issue, unless he is precluded by his deed. The averments of the cross-bill are imperfect, but they are sufficient as against a motion for judgment upon the pleadings.

In our judgment he is entitled to relief against the deed upon either of three grounds:

[1] 1. The deed was given under a mutual mistake of both grantor and grantee as to the extent of Barnett's interest in the land, they both believing that he had only a half interest. Looking at both the bill and cross-bill, as we must, Moore must have believed that Barnett owned a half interest and Jimmie Bird a half interest; while Barnett must have believed that he and Maggie Harjo each owned a half interest. A mistake as to the extent of a party's interest in land is a mistake of fact and not of law, although it may be induced by a mistaken view of the law. Pomeroy's Equity Jurisprudence (4th Ed.) § 849. The rule is there stated as follows:

"Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, or estates, either of property or contract, and enters into some transaction, for the purpose of affecting such assumed rights, interests or estates, equity will grant its relief defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."

This rule was expressly approved by this court in Order of United Commercial Travelers v. McAdam, 125 Fed. 358, 61 C. C. A. 22, and accurately states the law both in this country and in England.

[2] 2. The deed was given under a mistake by Barnett, as to the extent of his interest, which mistake was aided and confirmed by the statement of Moore that Barnett owned only a half interest. Considering the relative knowledge and ability of the parties to judge of such matters, this statement of Moore would constitute such an equitable circumstance as would justify granting relief to Barnett. Pomeroy's Equity Jurisprudence, § 847, and the numerous authorities there cited.

[3] 3. At the time the deed was signed it was the belief of both parties that Barnett was the owner of only a half interest, and that

was all either party intended to convey. The deed, therefore, fails to express the real contract between the parties; and it would be a fraud to permit Moore, who prepared it and is charged in the cross-bill to have represented to the Indian, who could not read English, that it conveyed only a half interest, to hold the entire estate, if it should turn out that Barnett was in fact the owner of the entire estate at the time the deed was given. Carrell v. McMurray (C. C.) 136 Fed. 661; Walden v. Skinner, 101 U. S. 577, 25 L. Ed. 963; Snell v. Insurance Co., 98 U. S. 85, 25 L. Ed. 52; Medical Society v. Gilbreth (D. C.) 208 Fed. 899; Phillipine Sugar Co. v. Phillipine Islands, 247 U. S. 385, 389, 38 Sup. Ct. 513, 62 L. Ed. 1177; Pomeroy, § 845.

[4] It seems clear, therefore, that Barnett, as against Moore, is entitled to a reformation of the deed, so that it will convey only a half interest, provided Jimmie Bird was not the lawful husband of Annie Bird. And as to the latter issue, as well as the issues relating to the giving of the deed, he was entitled to a trial upon the facts, and it was error to give judgment against him upon the pleadings.

[5] We are aware that the defendants Kunkle and the Prairie Oil & Gas Company claim to be good-faith purchasers. That, however, is an affirmative defense, and must be proven by them. Wright-Blodgett Co. v. U. S., 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637; Northern Colorado Coal Co. v. U. S., 234 Fed. 34, 36, 148 C. C. A. 50.

The case was greatly confused in the pleadings and arguments at the time it was before the trial court, because of uncertainty as to whether the inheritance was controlled by the rule in Shulthis v. McDougal or by the statute of Oklahoma. All that confusion has now been cleared up by the decision of the Supreme Court in Jefferson v. Fink. It may be that the pleadings ought to be reframed, so as to present the issue as it now exists. If so, the trial court will be at liberty to deal with any such matter in a way to promote a fair trial of the case upon the merits.

The decree is reversed, and the trial court is directed to proceed with the suit in accordance with the views here expressed.

HOOK, Circuit Judge. I do not think the pleadings as presented to the trial court and to us upon the record entitle appellant Barnett to a trial of the question whether he had a larger estate than the one he intended to convey.

(256 Fed. 648)

AGGERS v. SHAFFER et al.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1919.)

No. 4940.

1. COURTS ⟹312(1)—JURISDICTION OF FEDERAL COURTS—SUIT BY ASSIGNEE—"CHOSE IN ACTION."

Under the law of Oklahoma an oil and gas lease of the ordinary kind gives the lessee a present vested interest in the premises, and a suit by his assignee to protect his rights thereunder is not one on a "chose in action," within Judicial Code, § 24 (Comp. St. § 991), in which he must show diversity of citizenship between his assignor and defendants to give a federal court jurisdiction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chose in Action.]

2. MINES AND MINERALS ⟹79(6)—OIL LEASE—FORFEITURE.

An oil and gas lease requiring quarterly payments of rental until development work was begun, but not providing for forfeiture, nor making time of its essence, *held* not forfeited by a slight delay in making a payment through mistake.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by Charles B. Shaffer against W. A. Aggers and others. Decree for complainant, and defendant Aggers appeals. Affirmed.

For opinion below, see 241 Fed. 139.

Joseph C. Stone, of Muskogee, Okl. (Edward H. Chandler, Farrar L. McCain, John B. Meserve, and Ralph W. Garrett, all of Tulsa, Okl., Charles A. Moon, of Muskogee, Okl., and Francis Stewart, of Kansas City, Mo., on the brief), for appellant.

George S. Ramsey and Malcolm E. Rosser, both of Muskogee, Okl. (Edgar A. De Meules and Villard Martin, both of Tulsa, Okl., and J. Berry King, of Muskogee, Okl., on the brief), for appellee Shaffer.

John Devereux, of Tulsa, Okl. (F. B. Dillard and Bird McGuire, both of Tulsa, Okl., on the brief), for appellees other than Shaffer and Hyer.

Before HOOK and SMITH, Circuit Judges, and TRIEBER, District Judge.

PER CURIAM. This is a suit by Charles B. Shaffer, the assignee of an oil and gas lease of land in Creek county, Okl., against W. A. Aggers and others, to cancel subsequent leases, to enjoin the defendants from interfering with him in the enjoyment of his lease, and for other relief. Upon final hearing the plaintiff, Shaffer, was awarded a decree (241 Fed. 139), and the defendant Aggers, a subsequent lessee, appealed.

The lease was for the term of five years and as much longer as oil or gas was found in paying quantities. The lessee paid the lessors $120 as consideration at the execution of the lease and contracted to commence a well on the premises within 12 months or thereafter

pay the lessors a rental of $120 per annum, quarterly in advance, until the well was commenced. If a well was driven and oil or gas found, the lessors were to receive substantial returns therefrom. The lessee had the right at any time to surrender the lease for cancellation upon paying the lessors $1, provided he exercised it before bringing any suit or action to enforce its terms.

[1] The appellant contends that the trial court did not have jurisdiction of the suit. The ground of jurisdiction was diversity of citizenship, and such diversity existed between the plaintiff, on the one side, and the defendants, including the appellant, on the other. But it is urged that plaintiff's suit was for the specific performance of an optional unilateral contract, was therefore to recover upon a chose in action, within the meaning of section 24, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. § 991]), and, since the citizenship of plaintiff's assignor was not disclosed, the jurisdiction of the court below did not appear. It is enough to say of this that by the law of Oklahoma, where the land is, a lease like that held by plaintiff grants a present vested interest in the premises (Northwestern Oil & Gas Co. v. Branine, 175 Pac. 533; Rich v. Doneghey, 177 Pac. 86), and that the right he sought to protect and enforce is not a chose in action within the meaning of section 24 of the Judicial Code. The citizenship of plaintiff's assignor was therefore immaterial. The authority of Brown v. Wilson, 160 Pac. 94, L. R. A. 1917B, 1184, relied on for a contrary conclusion, is destroyed by the later cases above cited. Upon the nature of such leases, see Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856, held in the Rich Case, supra, to be substantially in accord with the rule in Oklahoma; also Kemmerer v. Midland Oil & Drilling Co., 144 C. C. A. 154, 229 Fed. 872.

[2] The remaining question is whether plaintiff's lease was forfeited by his failure to pay an installment of rent or delay money, as sometimes called, at the time it was due. There was such a failure, but it was clearly due to an accident or mistake induced by a confusion for which one of the lessors was primarily responsible. The lease provided that all payments should be made directly to the lessors or deposited to their credit in a designated bank in Oklahoma; also that the lessee should not be bound by any change in the ownership of the land, except upon notice with proof of the conveyance. The plaintiff, as assignee of the lease, adopted the course of making payments to the bank. After he had promptly made eight quarterly payments, covering a period of two years, he was informed that the lessors had sold the land in two parcels to separate grantees. One parcel was sold to W. J. Blaine and wife, and the proportion of annual rental attributable to it was $80, or $20 quarterly. This part of the leased premises only is in controversy in this suit.

One of the lessors, H. L. Marks, claimed to be the exclusive agent of the Blaines to receive their part of the rental payments. Marks also had a controversy with the Oklahoma bank, where the payments had been made, about matters for which the plaintiff was not responsible, and he desired a change to a bank in Kansas. As the time for the ninth quarterly payment was approaching there was considerable cor-

respondence between the plaintiff and Marks about the change in titles, the authority of the latter to represent the Blaines, the furnishing of proof of the conveyances, and the change of the depositary bank. The ninth payment was made in time to the Kansas bank for the credit of Marks as agent of the Blaines. Two weeks before the tenth payment became due plaintiff sent a draft for $20, the correct amount, to the Kansas bank, but made a mistake in his instructions regarding the credit. He directed that the amount be credited to Blaine, instead of to Marks, as agent of Blaine and wife. The bank did not know Blaine and held the draft without notifying the plaintiff. The mistake was discovered eight days after the payment was due. Plaintiff immediately tried to correct it, but Marks instructed the bank to decline to receive the payment on his account and refused payment himself. He orally asserted a forfeiture of the lease and afterwards gave plaintiff written notice to that effect. Thereafter the appellant, Aggers, with information of the circumstances, secured his lease, and other leases were given.

The lease under which plaintiff claims contains no forfeiture clause, nor provision making the time of rental payments of the essence of the contract. Plaintiff's interest in the premises was a substantial one; it was not based on a mere unilateral option, subject to the strictest construction, and forfeitable for the slightest deviation. The failure to pay at the precise time due was a pure accident or mistake. It was not intentional, nor in conscious disregard of the rights of the lessors or their grantees. The injury to the latter was not appreciable. Their position was technical and without substantial equity. Moreover, the change of the place of payment from Oklahoma to Kansas was at their instance and for their accommodation. The lease did not require plaintiff to assent to it, and had he continued making payments to the bank in Oklahoma its long familiarity with the transaction might well have resulted in a timely discovery of the mistake.

A point is made that plaintiff had no right to pay by draft. That was for the bank to determine, and it made no objection on that account. The lessors or their grantees were concerned with the credit on the bank's books, not as to how the funds were sent. Besides, the medium employed at the time in question was in accord with the prior custom.

The decree is affirmed.

(256 Fed. 651)

EASTERDAY et al. v. McCARTHY, United States Marshal.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 162.

1. CRIMINAL LAW ⟹108(1)—CONSPIRACY—VENUE—OVERT ACT.
The venue of conspiracy may be laid wherever an overt act is committed, under Criminal Code, § 37 (Comp. St. § 10201), making the commission of an overt act necessary to the offense, as well as at common law, though some of the indicted defendants were never in that district.

2. DISTRICT OF COLUMBIA ⟹4—APPLICATION OF CRIMINAL CODE.
The Criminal Code is a general act, and is coextensive with federal jurisdiction, unless otherwise specifically directed, and applies to the District of Columbia.

3. CONSPIRACY ⟹28—VIOLATION OF CODE OF DISTRICT OF COLUMBIA—"OFFENSE AGAINST UNITED STATES."
A conspiracy to violate Code of Law D. C. §§ 869a, 869b, enacted by Congress March 1, 1909, is a conspiracy to commit an offense against the United States, within Criminal Code, § 37 (Comp. St. § 10201).
[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Offense against the United States.]

4. CRIMINAL LAW ⟹242(2)—FEDERAL PRACTICE—REMOVAL OF ACCUSED.
Rev. St. § 1014 (Comp. St. § 1674), authorizing the removal of persons indicted for offenses to the district where trial is to be held, authorizes removal to the District of Columbia.

Appeal from the District Court of the United States for the Southern District of New York.

Petition by Wilen W. Easterday and others against Thomas D. McCarthy, as United States Marshal, for writs of habeas corpus. From orders of the District Court (250 Fed. 800), discharging writs previously issued, petitioners appeal. Affirmed.

Geo. A. Knobloch, of New York City, for appellant Vause.

Walter E. Warner, of New York City, for appellants Easterday, Wheeler, and Kinnier.

Francis G. Caffey, U. S. Atty., and Benjamin P. De Witt, Asst. U. S. Atty., both of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. By the Code of Law of the District of Columbia, §§ 869a, 869b, enacted by Congress March 1, 1909 (35 Stat. 670, c. 233), it is a criminal offense to keep a "bucket shop" within the District. No statute, applicable solely to the District creates or defines the offense of conspiracy. The relators appellants may (for purpose of argument) be assumed never at any time to have been within said District.

The Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1088), does create and define the crime of conspiracy in its section 37 (Comp. St. § 10201), and therein declares two or more persons guilty of the crime, if they "conspire * * * to commit any offense against the United States."

The grand jury of the District found indictment against those four appellants for a conspiracy to keep a bucket shop in Washington, setting forth as overt acts transactions occurring in that city, and constituting "bucketing," as defined or described in Joslyn v. Downing, 150 Fed. 318, 80 C. C. A. 205, and Bailey v. Phillips (C. C.) 159 Fed. 537.

The accused were arrested in New York on warrants charging a violation of Criminal Code, § 37, and held under section 1014, Revised Statutes (Comp. St. § 1674), for removal to the District of Columbia, whereupon they applied for these writs, because (1) they had never been in the District, (2) the indictment charged no crime against the United States, and (3) therefore section 1014 Revised Statutes was not applicable. These propositions evince more boldness than merit.

[1] 1. The doctrine of Rex v. Bresac, 4 East, 164, to the effect that venue in conspiracy may be laid wherever an overt act is committed, has long received general acquiescence (Bishop New Criminal Procedure, vol. 1, § 61; Wharton Criminal Law [10th Ed.] vol. 2, § 1397), and the decision was approved in Hyde v. United States, 225 U. S. 365, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. The construction of the conspiracy section (37) there announced, making the commission of an overt act necessary to constitute the statutory offense, does not impugn the rule of common law, and does make it (if possible) clearer than before that one who, with others like minded, causes an overt act to be committed in any jurisdiction, is liable to indictment for conspiracy in that jurisdiction. See, also, Ex parte Hoffstot (C. C.) 180 Fed. 240, affirmed 218 U. S. 665, 31 Sup. Ct. 222, 54 L. Ed. 1201.

[2] 2. The assertion that no offense is charged against the United States demands assent to at least one of two propositions: Either keeping a bucket shop in Washington is not a federal crime, or the Criminal Code, and therefore section 37, has no application to the District of Columbia.

The District is and always has been a part of the United States (Downes v. Bidwell, 182 U. S. 260, 21 Sup. Ct. 770, 45 L. Ed. 1088), under the exclusive jurisdiction of Congress (Shoemaker v. United States, 147 U. S. 298, 13 Sup. Ct. 361, 37 L. Ed. 170). Any and every criminal offense is a violation of sovereignty, and there is no other sovereign in or over the District, except the United States.

The Criminal Code is a general act, and is therefore coextensive with federal jurisdiction, unless otherwise specifically directed. It is therefore plainly applicable to the District, as was assumed in the Hyde Case, supra. And as to the preceding statute—Revised Statutes, § 5440 (Comp. St. § 10201)—see Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392.

[3] That an offense against the District Code of Law is an offense against the United States necessarily flows from the fact that it was the nation through its Congress that made the law and denounced the crime.

[4] 3. That Revised Statutes, § 1014, is applicable to removals to the District of Columbia, is too well settled to justify discussion. Benson v. Henkel, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919; United

States v. Campbell (D. C.) 179 Fed. 762; United States v. Wimsatt (D. C.) 161 Fed. 586. Anything to the contrary—In re Dana (D. C.) 68 Fed. 886—must be regarded as error.

Orders affirmed.

(256 Fed. 653)

In re WALSH.

(Circuit Court of Appeals, Seventh Circuit. February 19, 1919.)

No. 2692.

1. BANKRUPTCY ⟹413(½), 418(1)—DISCHARGE—OBJECTION BY STRANGERS.
As a discharge in bankruptcy operates merely to extinguish creditors' claims, no one other than a creditor can be a party in interest, and, under well-recognized rules, strangers to the proceeding cannot be heard to object, particularly in view of Bankruptcy Act, § 14b (Comp. St. § 9598) and General Orders in Bankruptcy, rule 32 (18 Sup. Ct. ix).

2. BANKRUPTCY ⟹415(2)—DISCHARGES—POWER OF REFEREE—STATUTE.
Under Bankruptcy Act, § 38 (Comp. St. § 9622), the referee in bankruptcy has no power to interfere in regard to the discharge of the bankrupt, though the court, notwithstanding the section, may refer matters arising out of the bankrupt's application for discharge to the referee as a special master.

3. BANKRUPTCY ⟹415(3)—DISCHARGE—OBJECTIONS BY COURT.
The District Court should not on its own motion interpose objections to a bankrupt's discharge, since it sits to try, not to create, the issue.

4. BANKRUPTCY ⟹404(1)—DISCHARGE—RIGHT OF BANKRUPT.
Discharges in bankruptcy should follow as a matter of right, where no objections are filed by the creditors or trustee, the parties in interest, to application seasonably made.

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

In the matter of Frank E. Walsh, bankrupt. From an order denying his application for discharge, the bankrupt appeals. Order reversed, with directions to enter order granting discharge.

Frank P. Burke, of Milwaukee, Wis., for appellant.

Before BAKER and EVANS, Circuit Judges, and FITZHENRY, District Judge.

EVANS, Circuit Judge. The order denying bankrupt's application for a discharge of debts was made without any objection from any creditor. This is assigned as error.

The referee, pursuant to the requirements of a rule in force in the district wherein these proceedings arose, filed a certificate, the material part of which reads as follows:

"He [bankrupt] has committed none of the offenses and done none of the acts prohibited in subdivision "b" of section 14 of said act [Act July 1, 1898, c. 541, 30 Stat. 544 (Comp. St. § 9598)] except that he has committed an offense punishable by imprisonment as in said Bankruptcy Act provided, to wit: He knowingly and fraudulently made a false oath in this proceeding on the 27th day of April, 1918, swearing that Schedule B attached to his petition herein was a true statement of all his estate; whereas such schedule

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was false, in that it did not mention a diamond ring of the value of $94 owned by him, and knowingly and fraudulently omitted therefrom."

Upon this certificate, and without other hearing, bankrupt was denied a discharge.

[1] As a discharge operates merely to extinguish creditors' claims, no one other than a creditor can be a party in interest. Under well-recognized rules of pleadings, strangers to the proceeding cannot be heard to object. This theory finds support in the statute. Section 14b reads:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant, unless," etc.

The right of the trustee to file objections is further limited by a later clause in the same subdivision reading as follows:

"Provided, that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose."

This conclusion is further confirmed by an examination of rule 32 of the General Orders in Bankruptcy (18 Sup. Ct. ix) announced by the Supreme Court, and which we think inferentially limits the right to file objections to creditors.

The foregoing citations would seem to deny to referees the right to interpose objections to discharges, as well as clearly recognizing the right of a bankrupt to a discharge, except in those cases where objections are filed and after full hearing the court determines that one of the six specified grounds for refusing a discharge exists.

[2] But any doubt as to the power of the referee to interfere in matters of discharge is removed by section 38 of the act (Comp. St. § 9622), which reads:

"Referees respectively are hereby invested * * * with jurisdiction to * * * (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy," etc.

While the court may, notwithstanding this section, refer matters arising out of bankrupt's application for discharge to the referee, the latter acts only as a special master in such instances and not as referee. Supreme Court rule 12, subd. 3 (32 Sup. Ct. viii).

[3] Nor should the court on its own motion interpose objections to the discharge; for courts do not create issues. They sit to try and determine them upon presentation of the evidence by the parties interested.

[4] We conclude that in all applications seasonably made, where no objections are filed, the discharges should follow as a matter of right.

The order denying bankrupt's application for a discharge is reversed, with directions to enter an order granting the discharge.

(256 Fed. 655)

INTERSTATE COMPRESS CO. v. AGNEW.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1919.)

No. 5012.

APPEAL AND ERROR ⟹169—SCOPE OF REVIEW—ISSUES NOT HEARD BELOW.
On writ of error an appellate court can only review those issues which were heard in the court below.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by J. W. Agnew against the Interstate Compress Company. Judgment for plaintiff, which on error was reversed. 255 Fed. 508, 168 C. C. A. 199. On petition for rehearing. Denied.

James R. Keaton, of Oklahoma City, Okl. (Frank Wells and David I. Johnston, both of Oklahoma City, Okl., on the brief), for plaintiff in error.

Everett Petry, of Tulsa, Okl., for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. Defendant in error in his petition for rehearing calls our attention to the act of the state of Oklahoma, known as the Uniform Warehouse Receipts Act, of March 30, 1915 (Laws 1915, c. 288), and the fact that a number of the bales of cotton destroyed had been delivered to the plaintiff in error for storage thereafter.

We did not overlook that fact, but the effect of this act of 1915 was not raised at the trial in the court below. There was no reference to it in the charge to the jury, nor did either party request any instructions as to the liability of the plaintiff in error under that act. The court in its charge declared the conditions in the warehouse receipts void as being against the public policy of the state, evidently in deference to the opinion of the Supreme Court of Oklahoma in Inland Compress Co. v. Simmons, 159 Pac. 262. The decision in that case was not based on the statute now invoked, but on a general proposition of law.

On writ of error an appellate court can only review those issues which were heard in the court below. It is not permissible for one to ask the appellate court to dispose of the case on a theory different entirely from that on which the case was tried in the trial court.

Counsel in their brief only called attention to the act of 1915 for the purpose of showing what the public policy of the state is. He stated in his brief:

> "As further evidence of the tendency of public policy, a large number of the states of the Union, including Oklahoma, have adopted what is known as the 'Uniform Warehouse Receipts Act,' prepared by the American Bar Association, which is an effort to codify the common law thereon, and adopt the best and soundest rule in the event of variance of the authorities."

Nothing that was said in our opinion prevents the defendant in error from raising that question by proper pleadings when the cause is

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retried. The reversal by this court was "with instructions to grant a new trial and proceed in conformity with this opinion."

In order that there may be no doubt as to what we have decided, we now state that the question of the liability of the plaintiff in error for the loss of cotton delivered for storage to the plaintiff in error after March 30, 1915, is not foreclosed by anything said in our opinion.

The motion for rehearing is denied.

(256 Fed. 656)

STRYKER DEFLECTOR CO., Inc., v. PERRIN MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 146.

1. PATENTS ⟹288—JURISDICTION—PATENT INFRINGEMENT—AGENCY.
   Evidence *held* insufficient to show that a jobber handling defendant's article, which it was claimed infringed plaintiff's patent, was the defendant's agent within Judicial Code, § 48 (Comp. St. § 1030), authorizing service upon the infringer's agent in certain cases.

2. PATENTS ⟹288—INFRINGEMENT—JURISDICTION.
   If jobbers forwarded orders to their principal in another state and the goods were shipped direct by the principal, the sale is consummated outside the state, and there is no patent infringement within the district under Judicial Code, § 48 (Comp. St. § 1030), conferring jurisdiction in districts where the infringement is committed.

3. COURTS ⟹276—JURISDICTION—WAIVING OBJECTION.
   Where a preliminary motion raising the question of jurisdiction was denied, an answer, specifically reserving the objections previously made to the court's jurisdiction, does not waive the objection to the venue.

4. PATENTS ⟹328—VALIDITY—INFRINGEMENT.
   Stryker patent. No. 1,148,128, claims 1 and 2, for incandescent electric light deflectors, *held* valid and infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Stryker Deflector Company, Incorporated, against the Perrin Manufacturing Company, Nelson J. Quinn, E. L. Allen, and Asch & Co., Incorporated. Decree reversed, and complaint dismissed as to the first three named defendants, and affirmed as to Asch & Co., Incorporated.

This appeal comes here from a decree of the District Court for the Southern District of New York sustaining patent No. 1,148,128, for a deflector for electric lamps; patent granted July 27, 1915. Appellee is the assignor of the patent. It is designed for use in automobile headlights. Below, there was a decree for appellee sustaining the validity of the patent, finding infringement, and the decree provided for an injunction and an accounting. Defendants appeal.

Goldsmith & Fraenkel, of New York City (Lucius E. Varney, of New York City, of counsel), for appellants.

Martin B. Cohn, of New York City (Thomas E. Boyd, of Buffalo, N. Y., of counsel), for appellee.

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Before ROGERS and MANTON, Circuit Judges, and LEARNED HAND, District Judge.

MANTON, Circuit Judge. At the hearing, the appellants appeared and sought an adjournment, which was refused. The appellants thus defaulted, and the trial proceeded. Appellee put in its proof, and a decree was entered, from which this appeal is taken. At the outset, the appellants challenge the jurisdiction of the District Court for the Southern District of New York as to the appellants Perrin Manufacturing Company, Nelson J. Quinn, and E. L. Allen. Quinn and Allen traded as a copartnership under the name of Perrin Manufacturing Company. The former resides in Ohio and the latter in Michigan. Section 48 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1100 [Comp. St. § 1030]), re-enacting the act of March 3, 1897, c. 395, 29 Stat. 695, provides:

"In suits brought for the infringement of letters patent" in the District Courts of the United States, "the District Courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

[1, 2] It is asserted that neither Quinn nor Allen fall within the provisions of the above section of the Judicial Code. Service was made upon the appellants named by serving P. M. Asch, secretary of Asch & Co., Incorporated, at No. 16 West Sixty-First Street in New York City. The marshal's return to the subpœna shows that the service was made upon Asch as representative for the said appellants. The act of infringement in the Southern district consists of a sale by Asch & Co., Incorporated, at its place of business No. 16 West Sixty-First street. Unless Asch or Asch & Co., Incorporated, is in fact and in law the agent of the copartnership, the District Court had no jurisdiction. Westinghouse Electric Co. v. Stanley Electric Co. [C. C.] 116 Fed. 641. It appears, when Mr. Boyd entered the office of Asch & Co., Incorporated, and purchased the device which is said to infringe the Stryker patent, he asked the clerk in charge if Asch & Co., Incorporated, were the New York representatives of the Perrin Manufacturing Company of Detroit, Mich., and the man in charge stated that they were. Apart from this, there is the correspondence in the record between it and Taylor & Co. of Buffalo. There were three letters signed by Asch & Co., Incorporated, and a fourth by the Perrin Manufacturing Company, the latter dated at Detroit on a letter head indicating a New York address, as well as one in San Francisco, Dallas, and Toronto. The New York address appears to be the former address of Asch & Co., Incorporated, but the most these letters suggest was that Taylor & Co. were handling headlights of the Perrin Manufacturing Company, which were purchased through Asch & Co., and dealt with a question

of freight allowance. They also contained an assurance that the Perrin Manufacturing Company would protect Asch & Co., Incorporated and their customers on the sales of the Perrin "No-Glare"; in other words, that the Perrin Manufacturing Company was standing behind Asch & Co., Incorporated, the jobber, in handling the Perrin "No-Glare."

We do not think that this circumstance of the manufacturer protecting the jobber or a prospective customer can by any stretch create a presumption that the manufacturer and jobber are one and the same person or firm. While the record contains only the appellee's proof, and we must examine this question in light of the record, we believe that the proofs indicate that Asch & Co., Incorporated, was not the agent of the Perrin Manufacturing Company. Asch & Co., Incorporated's, letter heads indicate no relation of agency for the Perrin Manufacturing Company, nor was there any indication by sign on the office door or otherwise, at the place where Mr. Boyd made his purchase. Therefore the testimony as to agency depends upon the information furnished by the clerk in charge of Asch & Co., Incorporated, at the time of the purchase. The language of the clerk is not inconsistent with a relationship of that of manufacturer and jobber handling the product of the Perrin Manufacturing Company. The guaranty to protect against charges of infringement contained in the correspondence is consistent with the relationship of principal and agent. The burden of proof was upon the appellee before it was entitled to a decree as against these appellants to establish the necessary jurisdictional facts. We are not satisfied it has proven that the act of the single sale of Asch & Co., Incorporated, of the Perrin "No-Glare" shade is sufficient to confer jurisdiction of the District Court as against Quinn and Allen. Indeed, if Asch & Co., Incorporated, were the representatives of the Perrin Manufacturing Company in New York, it may only have meant that they solicited orders and forwarded them to its principal at its home office in another state, and that the goods were shipped direct by the principal. Thus the sale would have been consummated in another jurisdiction, and it would not constitute an infringement of patent within the district so as to confer jurisdiction. Tyler Co. v. Ludlow-Saylor Co., 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808.

[3] The question of jurisdiction was raised on a preliminary motion and denied. An answer was filed by the appellants "reserving to themselves the benefit of the objections heretofore taken by them to the sufficiency of process upon them and to the jurisdiction of the court over their persons." By this they reserved the right to urge this objection to the venue, and the objection has not been waived. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237; Southern Pacific v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942.

[4] As to Asch & Co., Incorporated, we are of the opinion that the decree below should be affirmed. In concluding thus, we hold that the patent in suit is valid and infringed.

The invention relates to a deflector which is designed most particularly on incandescent electric lights of automobile headlights. Its

object is the production of a deflector, simple and inexpensive in construction, which can readily be applied to and removed from incandescent lights of the types of headlights now in general use. So that only the roadway ahead of the automobile is illuminated to the waist line of a person standing in the street or riding in a car, leaving the space above this line in darkness, thus avoiding dazzling or blinding the eyes of persons by the glare of the headlights. This deflector, which is applied to the lamp bulb, comprises a rear shield of sheet metal having a degree of flexibility and of semiglobular form, so as to embrace and cover parts of the rear side and under side of the globular bulb. It also provides in its rear part an opening which is adapted to receive the shank of the lamp. The front part of the rear shield is so constructed as to form jaws which extend forwardly upwardly beyond the axis of the lamp bulb on diametrically opposite sides thereof, thus causing the rear shield section to grip and embrace slightly more than one-half of the globular form of the lamp. The upper front portions or jaws engage frictionally with the lamp bulb for holding the rear shield section securely on the bulb. In addition to this rear shield section, there may be employed a front shield which is constructed in the form of a cap which engages the central part of the front side of the lamp bulb and fits over the tip projecting forwardly from this part of the bulb. The front shield section is retained in place on the lamp bulb by connecting its rear edge with the front edge of the rear shield section by means of longitudinal springs arranged on diametrically opposite sides of the shield sections and adapted to engage on the horizontally opposite sides with the lamp bulb. In placing this deflector on the electric light bulb, it is necessary to first slip the rear shield with its opening over the shank of the bulb and spring the foremost parts or jaws over the bulging sides of the bulb and stretch the spring sufficiently to permit of the engagement of the front shield section over the tip of the lamp, after which they are reliably held in place and prevented from becoming detached. This provides for a removable shade as occasion requires. The effect is to provide for the control of the rays of light as above indicated, the head of the automobile is illuminated high enough for all practical purposes to insure safety of travel, while the space above the axis of the lamp is maintained in substantial darkness, thereby avoiding the dazzling glare on the eyes of persons in front of the automobile.

Claims 1 and 2 of the patent in suit, which are relied upon principally by appellee, are as follows:

"1. A deflector for incandescent electric lamp bulbs comprising a rear shield section adapted to cover parts of the rear and underside of the bulb and an independent front section adapted to cover the central part of the front side of the bulb and connected with said rear section.

"2. A deflector for incandescent electric lamp bulbs comprising a rear shield section adapted to cover parts of the rear and underside of the bulb and a front section adapted to cover the central part of the front side of the bulb, and a flexible connection between said front and rear shield sections."

In the effort to defeat the appellee, we are referred to the prior art, Lennon's patent No. 1,137,221 and the McLean patent, No. 1,146,269. These patents were not part of the prior art when Stryker filed his

application on March 29, 1915. Both the Lennon and McLean applications were pending at the time, but we think that the test of priority of application does not apply, for the reason that we are of the opinion that Stryker has discovered a different invention from either Lennon or McLean, and that they are therefore not rival inventors. The Lennon patent, No. 1,130,180, was part of the prior art when Stryker filed his application, but we do think that there is a difference and an improvement in the Stryker patent, for the cap on the end effected a change, and some of the rays of the lower hemisphere were allowed to reach the road. The Lennon patent, No. 1,130,180, provides for a deflector where the body portion is made of one piece, and not of two pieces which are connected with each other and which engage the front and rear sides of the bulb. It does not present two distinct sections as does the patent in suit.

In the McLean shield deflector, the shading is done by applying light-intercepting elements permanently to the bulb, and in the patent in suit the shading is done by two interconnecting shades which are removable from the bulb.

We are of the opinion that the prior art does not invalidate the patent in suit; also that claims 1 and 2 are infringed. The active infringement being proven by the sale of Asch & Co., Incorporated, we shall affirm as to it. The decree will therefore be modified by reversing as to Perrin Manufacturing Company, Quinn and Allen, and the complaint dismissed and affirmed as to Asch & Co., Incorporated.

(256 Fed. 660)

GENERAL ELECTRIC CO. v. CONTINENTAL FIBRE CO.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 174.

1. PATENTS ⟹75—PRIOR PUBLIC USE—EXPERIMENTAL USE.

The use of a number of gears made of compressed cotton fibers in a plant where the inventor of such gears was employed for experiment, and to convince skeptical superiors of their merit, is not a public use which will defeat the right to a patent on an application filed more than two years after the first gear was constructed, but less than one year after such gears were on the market.

2. PATENTS ⟹110—APPLICATION—CONTINUANCE OF FORMER APPLICATION.

An application for a patent for gears made of compressed textile material, the specific material used being cotton batting, describes the same invention as a prior pending application describing the material as compact layers of textile fibers; and, there being no showing of their intention to abandon the original invention, the subsequent application can be treated as a continuation of the former.

3. PATENTS ⟹69—ANTICIPATION—VAGUE PUBLICATION.

A publication that another firm had sent out a catalogue of a silent gear made of fiber of prepared cotton is too vague to enable an expert to carry the device into practical use, and does not invalidate a subsequent patent for a gear made of compressed cotton fibers.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. PATENTS ⟹328—CONSTRUCTION—LIMITATION OF CLAIMS—NOVEL INVENTION.

The use of compressed textile fabrics, unchanged by vulcanizing, for gears, was fundamentally new in the gear art, though a similar use had been made in other arts, and the Miller patent No. 1,061,770, for gear composed of that material, is entitled to the advantages of broad equivalence flowing from absolute novelty of invention.

5. PATENTS ⟹328—INFRINGEMENT—COMPRESSED FIBER GEARS.

The Miller patent, No. 1,061,770, for a gear of compressed textile fabrics and means for holding the material in a compressed state, is infringed by a gear composed of fibers held in place by the patented composition bakelite; since the fundamental merit of the patented gear is the resistance of a large number of fibers within a small space, which is also the fundamental merit of the infringing article.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the General Electric Company against the Continental Fibre Company for infringement of patent. Decree for defendant, and complainant appeals. Reversed and remanded.

Action is upon claims 1, 2, 3, 5, and 6 of patent to Miller dated May 13, 1913, No. 1,061,770.

The subject-matter of the patent is a "gear wheel." Claim 3 is as follows: "A gear composed of compressed spinnable textile fibers and means for holding said material in compressed state."

This claim is typical of all those in suit except No. 6, which is as follows: "A gear having its toothed body portion composed of layers of textile fabric made of spun yarn."

The thing invented by Miller, described in the specification and sold by the plaintiff company, is a gear or cogwheel made of cotton highly compressed and held under compression by metallic end-plates secured by rivets passing through the compressed cotton which provides the teeth. A disc or blank is made in this manner and teeth cut to suit, as has long been the custom in respect of metal cogs.

Miller was in 1908, and long had been, the master millwright of the plaintiff; he recognized, as had many other machinists and inventors, that the desirable qualities of a gear were that it should be strong, durable, tough, elastic, oil and water proof, not subject to atmospheric or thermal changes, not attractive to vermin, and as noiseless as possible.

It was part of his work to watch and overhaul (among others) a machine known as a punch and shear, capable of shearing boiler plates up to 1¼ inches in thickness. He tried every type of gear wheel known, and finally thought of attempting to make one out "of cloth—one morning while I was pulling my clothes on." He thereupon made a gear blank out of a worn-out buffing wheel, a tool composed of layers of cotton or linen canvas; tried it on a small machine; and shortly, out of similar rag-bag material, made a cog which actually drove the above-mentioned punch and shear for several years. Miller communicated what he had done to his superior officer, Mr. Riddell, himself an inventor in this line of mechanics. Plaintiff, as Miller's assignee, filed application for a patent on February 12, 1909.

Contemporaneously Miller made more wheels. They were placed in increasing numbers on tools in plaintiff's factories, and experiments were conducted with textile materials other than woven cotton cloth, with the result that what is commonly known as cotton batting came to be used; and, the value of Miller's gears having been experimentally demonstrated, plaintiff offered them for sale in the latter part of 1910. The public appreciation of the product is sufficiently shown by the growth of sales from 1,570 gears in the year 1911 to annual sales of slightly under 200,000 immediately before

the trial of this cause. It is admitted that Miller's gear possesses all of the desirable qualities hereinabove enumerated.

It is rare that the history and development of any invention is shown so clearly and without any contradiction whatever.

When application was filed in 1909, Miller had not made gears of cotton batting, and, while he fully disclosed the advance embodied in his cotton cogs, he described his new component as consisting of "layers" or "piles" of "textile fabric," and propounded as a typical claim "a gear having a toothed part composed of compacted layers of textile fabric." His application was rejected on references upon which no reliance is now placed. Indeed, it is difficult to understand the office attitude displayed by the file wrapper contents.

On July 26, 1910, the word "fabric" was in some instances amended to "material." But on June 27, 1911, a new application was filed specifically as a continuation of the application of 1909. In all of the claims propounded and finally allowed (except the sixth), the body of the gear was described as of "textile material"; but the sixth claim has from the beginning adhered to the phrase "textile fabric." The words "spinnable textile fibers" came in by amendment as a concession to office opposition which was finally overcome only by appeal to the examiners in chief.

The application of 1911 was filed within a year of the last office action on that of 1909.

Defendant does not manufacture gears, but makes and sells discs capable of being cut into gears by any trained mechanic, which discs are composed of layers of cotton duck impregnated with and surrounded by a substance commercially known as "bakelite." The content of each gear is approximately 60 per cent. cotton duck and 40 per cent. bakelite, which latter is an invention of Mr. L. H. Baekeland, consisting of a mixture of "phenol, or its homologues, and formaldehyde, or its polymers." This mixture, when sufficiently heated, is transformed into "a hard body unaffected by moisture, insoluble by alcohol or acetone, infusible and resistant to acids, alkalies and almost all ordinary reagents." Baekeland patents, Nos. 942,699, 942,852, 949,671, 1,019,406. The production of this hard, infusible, and indecomposible bakelite is hastened, and improved by adding pressure to heat, because pressure hastens the process of hardening and avoids air bubbles. But pressure is not necessary to make bakelite; heat applied to the aforesaid mixture will do it in time. And it is in result the same substance with or without pressure added to the heat.

It is not doubted or denied that defendant's compound of cotton duck and bakelite makes a gear functioning exactly as does Miller's. It is denied that this result is obtained in the same way, for the same reasons, or by substantially the same means.

The court below held the Miller patent valid but not infringed by a cog wheel made of defendant's product. From decree accordingly plaintiff appeals.

Charles Neave, of Boston, Mass., and L. F. H. Betts, of New York City, for appellant.

Kerr, Page, Cooper & Hayward, of New York City (Thomas B. Kerr, of New York City, Vernon E. Hodges, of Washington, D. C., and John C. Kerr, of New York City, of counsel), for appellee.

Before ROGERS and HOUGH, Circuit Judges, and MAYER, District Judge.

HOUGH, Circuit Judge (after stating the facts as above). In this court some measure of invention in Miller's patent is no longer denied. Nor is it doubted that a cotton-rag gear wheel was made and used in August, 1908, as above set forth.

It is contended:

(1) That a claim for a gear of "spinnable textile fibers," if construed to cover one made of cotton duck, is invalid; because there were

two years of public use prior to the application of June 27, 1911, of Miller's original cotton gear which was composed of a "textile fabric"—a phrase plainly covering cotton duck.

(2) Even if Miller's date of invention be allowed as August, 1908, certain English publications, as early as March 20, 1908, regarding "Unica silent gears made of fiber of prepared cotton," are sufficient evidence of anticipation. And

(3) There is no infringement even of the sixth claim, because defendant's product is not composed of layers of textile fabric, but of bakelite reinforced by such layers, and the completed gear disc is a "solid, hardened, homogeneous mass" wholly different "in nature and attributes" from Miller's collection of fibers held together "by pressure applied externally."

[1] 1. We incline to think that the record does not show two years of public use before June 27, 1911. Any use, public or otherwise, of Miller's reduction to practice largely depended upon the favor with which his device was received by his superior, Mr. Riddell. That gentleman had the conservatism of one who had himself taken out a patent in the same field of art (No. 464,896); and it was not until June of 1909 that he said of Miller's gear:

> "We have the goods here (i. e., in the General Electric Works) running every day, giving a practical demonstration, some giving the hardest kind of service."

There were then some 70 or 80 wheels in use, and Mr. Riddell said of them:

> "Some of our own engineers and others with whom I have spoken have been inclined to poke fun at the idea. I was myself inclined to be a little skeptical when the matter was first brought to my attention."

Indeed, the general attitude of practical men toward the new departure is well illustrated by a facetious proposal for a "catalogue cover" for Miller's "new process rag pinion," whereby it is stated (with appropriate illustrations) that the raw material is to be obtained from the family wash line, and a branch office established at "Bellevue." We do not think that Miller's invention passed beyond the stage of daring experiment until this attitude of satirical disbelief had been forgotten and the commercial article was offered for sale—an event which did not occur until the fall of 1910.

[2] But irrespective of the foregoing finding, we hold that as matter of law Miller was justified in calling his application of 1911 a continuation of that of 1909. There never was any allowance under the earlier specification. Such decisions as Weston v. Empire, etc., Co., 136 Fed. 599, 69 C. C. A. 329, do not apply. It is not doubted that one application may, under certain circumstances, be a continuation of a prior application (Model Bottling Co. v. Anheuser, 190 Fed. 573, 111 C. C. A. 389) and it is not asserted in this instance that there was any abandonment of invention, which is a different thing from abandonment of application (Western Elec. Co. v. Sperry, 58 Fed. at page 191, 7 C. C. A. 164; Hayes-Young, etc., v. St. Louis, etc., Co., 137 Fed. 80, 70 C. C. A. 1).

We doubt not that Miller filed his second application in order to add or insert language apt for describing his use of cotton in a cruder state than that of woven cloth; but he abandoned nothing by intent. His applications were co-pending, and the matter is far within our decision in Victor, etc., Co. v. American, etc., Co., 145 Fed. 350, 76 C. C. A. 180; and Corrington v. Westinghouse (C. C.) 173 Fed. 69. Where an intent to continue is manifest (as it is here), or is proven, the question is (as put in the Victor Case, supra) whether the specification of the earlier application was sufficient as a basis for the claims ultimately founded on the later application. Or as put in Field v. Colman, 40 App. D. C. 598, the doctrine of continuity "broadly depends upon whether the substituted application is for the same invention as that disclosed in the original application."

Applying these rules, the queries in this case, concretely put, are these: Could the claims in suit have been properly issued on the original specification; or, if all the claims had used the words "textile material" or "textile fabric," would it have been an infringement to make gears not differing from Miller's first embodiment otherwise than by substituting cotton batting for cotton rags?

We answer both these questions in the affirmative for reasons largely depending upon the nature and importance of Miller's invention, as hereinafter set forth. We therefore hold the patentee's date of invention to be August, 1908.

[3] 2. The defense based upon publications regarding the English "Unica" gears rests upon extracts from the periodicals "Engineering," and "The Practical Engineer" of London, dated March 20 and November 27, 1908.

Assuming the invention date above awarded Miller, only the earliest publication requires attention, and that consists in a statement that—

> Certain manufacturers "have sent out a catalogue of their Unica silent gears made of fiber of prepared cotton. These, it is stated, are unaffected by oil. * * *"

The later publications speak, one, of the pinions, as "made of compressed cotton"; the other uses the words "prepared cotton."

While the evidence is persuasive that the Unica gears were merely a variety of vulcanized fiber gears, we reject the publication of March 20, 1908, and would reject the subsequent publications, if they were relevant, on the ground stated fully in Baedische v. Kalle, etc., 104 Fed. 802, 44 C. C. A. 201. The vague statements of result contained in the newspaper articles offered in evidence would not have given in 1908, to even the most skilled, any information enabling an expert to carry into practical use Unica gear, or any other mechanical device. Therefore any or all of them are insufficient to invalidate the patent in suit, or even to limit or modify its scope.

[4] 3. Whether infringement exists is a question depending largely on the importance attached to Miller's invention. If the art of producing silent, waterproof, vermin-proof, tough, durable, and elastic gears be considered as an art by itself, there is no prior art detracting from or limiting Miller's inventive conception. Noiseless gears had long since been a desideratum, and nonmetallic substances, i. e., wood,

rawhide, leather, papier-mâché, and vulcanized fiber, had all been tried and found wanting. The use of textile fibers unchanged by vulcanization was fundamentally new in the gear art; and prior patents for buffing rolls (Poole, 188,670) and friction wheels (Rockwood, 300,013) are entirely irrelevant.

Whatever advantages, therefore, in respect of breadth of equivalents flow from an absolute novelty of inventive thought—are justly due to Miller.

[5] Whether the bakelite gear produces Miller's result in substantially Miller's way depends fundamentally on ascertaining the reasons why the original cotton-rag cog wheel worked and kept on working for several years.

We find that by compression of spinnable fibers, whether contained in cotton batting or in cotton cloth, the patentee obtains an enormous number of these fibers in frictional contact contained in a very small space.

The initial pressure exerted in the process of manufacture depends upon the original looseness of fiber in the raw material. Cotton batting requires more pressure than cotton cloth.

But when the requisite number of fibers have been compressed into the requisite dimension, a considerable part of such compression is permanent, and the back-pressure or expansive tendency of what is held between Miller's containing plates is (in respect of cloth gears) sometimes as low as 500 pounds and (in the case of a cotton batting gear) never higher than 2,500 pounds. Thus, the merit or working virtue of the patented gear consists solely in the presence within a given space of a relatively enormous number of vegetable fibers in frictional contact with each other. The only function of the metal sides and rivets is to keep these fibers in place.

Defendant's product, size for size, has, we are convinced, substantially the same number of fibers, which are also in frictional contact, and held in place, not by metal sides, but by the interstitial permeation of bakelite—a substance in itself and its attributes most remarkable, but which in relation to gears has no other relation to the cotton fibers that enable the gear to do its work, than has the metal container of Miller. The whole contention on the question of infringement is summed up in the inquiry whether defendant's product is cloth reinforced with bakelite instead of metal, or whether it is composed of bakelite reinforced with cloth.

It being plainly true that for gear purposes the only strength in defendant's article is that of the cloth, it must follow that defendant's is a cloth gear held together by bakelite. This remarkable substance is as brittle as it is hard and unchangeable. A pure bakelite gear would be worthless for the lightest machinery. There is no chemical change wrought by the mechanical union between cloth and bakelite; the cloth remains cloth, and the bakelite remains bakelite. The sole function of the bakelite in defendant's gear disc is the same function as that of the rivets and metal sides in Miller's original device.

The fact that it requires no more than 750 pounds initial pressure to drive defendant's cotton cloth into desired contiguity, fiber to fiber,

is much dwelt upon in defense. This may well be a manufacturing advantage on defendant's side. The pressure is substantially the same as the ultimate pressure or back pressure in Miller's cloth gear. But bakelite is neither compressible, ductile, nor elastic; and when bakelite is the holder, container, or restrainer of pressure, whatever shape is given by the initial compression remains absolutely fixed as soon as the bakelite hardens.

For these reasons we consider that defendant's product responds to all the claims in suit; that the claims cover a basic and wholly novel idea, viz., the attainment of a strength sufficient to drive heavy machinery by juxtaposing a sufficient number of feeble textile fibers within a given space; and that this thought, which vitalizes the patent in suit, is the same thought which enables defendant's gears to do their work. It may well be that in attractiveness of appearance, and lightness of weight, defendant's bakelite retainer of compression is superior to Miller's metal sides. But what makes the gear a gear is the same thing in both products. Therefore infringement exists.

It is said that bakelite gear is "self-sustaining." This is only true in the sense heretofore pointed out, viz., that no plates or rivets are required because the bakelite itself, by coating or permeation, is a fair and indeed an exact mechanical equivalent to the end-plates and the rivets of plaintiff's gear wheels.

As defendant does not make or sell completed gears, but a material which when in discs makes gear making easy, and when in other forms may have other uses not related to machine driving, the injunction to issue under this decision may require careful drafting; but this record enables us to do no more than call attention to a question that may be important—and may amount to nothing.

We may say (but for lack of evidence this is not a holding) that we perceive no reason, on this record, why defendant's product cannot be used, if suitable, for any purpose not amounting to a gear; that being the sole subject of Miller's patent.

Decree reversed with costs, and cause remanded for further proceedings not inconsistent herewith.

(256 Fed. 666)

STANDARD SCALE & SUPPLY CO. v. CROPP CONCRETE MACHINERY CO. et al.

CROPP CONCRETE MACHINERY CO. et al. v. STANDARD SCALE & SUPPLY CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919. Rehearing Denied March 4, 1919.)

Nos. 2526, 2527.

1. PATENTS ⟹155—EFFECT OF DISCLAIMER.

A claimant of a generic invention does not lose his right by declining to claim some other person's subsequently devised form.

2. PATENTS ⟹328—INFRINGEMENT.

Cropp patent, No. 947,196, dated January 18, 1910, claims 1, 2, 3, 4, 7, 9, 12, 13, 14, and 16, for a concrete mixer, *held* valid and infringed; patents

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

to Ransome, No. 322,006, No. 804,803, and No. 870,797, to Burns, No. 661,487, and to Roberts No. 845,435, not being pertinent.

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Proceedings between the Standard Scale & Supply Company and the Cropp Concrete Machinery Company and Andrew J. Cropp concerning patent rights. There was a decree in favor of the former as to one claim, and in favor of the latter as to other claims, and they both appeal. Decree in favor of the former reversed, and that in favor of the latter affirmed.

George L. Wilkinson and Percival H. Truman, both of Chicago, Ill., for appellant.

Franklin M. Warden, of Chicago, Ill., for appellee.

Before BAKER and EVANS, Circuit Judges.

BAKER, Circuit Judge. Cropp Company and Cropp obtained a decree that claims 1, 2, 3, 4, 7, 12, 13, 14, and 16 of patent No. 947,196, January 18, 1910, to the company as assignee of Cropp, for a concrete mixer, were valid and infringed by the Standard Company's machine. No. 2526 is the Standard Company's appeal from that finding. In the same suit a complaint based on claim 9 was dismissed on the ground of noninfringement, and the appeal in No. 2527 assails that ruling.

Claim 9, which relates to the charging means, reads as follows:

"9. The rotary mixing receptacle having at its receiving end a charging device consisting of a centrally apertured disk secured to the receptacle, and a series of blades extended at their outer ends from the disk inwardly and diagonally with respect to the receptacle for a short distance from the disk for the purpose of directing the material into the receptacle, said blades having their portions adjacent to the disk of substantially the same width as said disk from the opening therein to its periphery and their inner portions widened."

Portable machines, of rotary drum type, for mixing batches of concrete, are used in situ in various building operations. In prior machines the opening at the receiving end was so high from the ground that the workmen in bringing the materials had to wheel their barrows up a staging. In the structure of claim 9 this difficulty is obviated by reason of the large size of the aperture in the disk; and at the same time the mixing capacity of the rotary drum is preserved by the action of the peculiarly formed and arranged diagonal blades. Utility is manifest. Nothing in the prior art gives any hint of the idea embodied in claim 9. Invalidity is predicated solely upon Patent Office proceedings which resulted in Cropp's inserting the following disclaimer in his application:

"I hereby disclaim the following claim, to wit: In a mixer, in combination, a revoluble drum, means therein to agitate and mix the material, a continuous series of circularly arranged charging pockets located at one end of the drum within its cylindrical wall and closed at their outer ends, the open inlets of the pockets being turned toward the axis of the drum, a circular head having its periphery contacting with the tops of the pocket walls and set in from the adjacent end of the drum, and means to introduce material to the inlets of the pockets outside of said head."

[1] In Reed v. Cropp Concrete Machinery Co., 239 Fed. 869, 152 C. C. A. 653, the history of the three-cornered interference between Cropp, Reed, and Sanborn and the relation of the disclaimer to Cropp's claim 9 were fully considered. Though the decree in that case may not be res adjudicata, we find no reason in the present record for hesitating to say stare decisis. Cropp's application described two forms of the "low-charging" structure. His claim 9 was aptly worded to cover the genus exemplified by his two forms. Later Sanborn disclosed another form and claimed it in the words subsequently copied by Cropp in his disclaimer. When Cropp was invited to interfere, he replied that he was not the inventor of the Sanborn species. Manifestly neither Cropp nor the Patent Office understood that he was thereby confessing that he was not the inventor of the genus, for otherwise Cropp would not have continued to prosecute, and the Patent Office would not have allowed, claim 9. Indeed, the Standard Company does not seriously dispute the legal principle involved in the Reed case, namely, that a claimant of a generic invention does not lose his right by declining to claim some other person's subsequently devised form.

Nevertheless it was open to the Standard Company to defend on the ground that Sanborn or Reed had been the first to devise any form of "low-charging" mixer, and that Cropp consequently was not entitled to hold his generic claim. In the Reed Case, the burden of proving priority was on Cropp; here it is on the Standard Company. Though there is some additional testimony, it relates in the main to the development of the second form described in Cropp's application. Respecting Cropp's creation of the first form, and therefore of the genus, the evidence which led us before to an affirmative finding in Cropp's favor is now considered sufficient to repel the Standard Company's attack upon the prima facie validity of the claim.

In the claim the charging blades are described as "having their portions adjacent to the disk of substantially the same width as said disk from the opening therein to its periphery." In the Standard Company's machine the outer portions of the charging blades are of slightly less width than the "disk from the opening therein to its periphery." But the proofs leave it sufficiently clear that the Standard Company obtains the full result of Cropp's "low-charging" machine by charging blades formed, arranged, and operating according to the principle disclosed by Cropp. The proven departure was therefore not sufficiently "substantial."

Claim 13 is a fair statement of Cropp's invention of discharging means:

"13. The rotary mixing receptacle having an opening in its discharging end, a chute located in said opening and extended into the receptacle, a door pivotally mounted within the receptacle and adapted to open and close the chute and to assist in guiding the material thereto, a plate secured to the receptacle at its discharging end and extended radially thereinto within the path of the door, and another plate diagonally disposed from the last-named plate partially across the inner surface of the receptacle."

Through an opening at the discharging end a chute extends into the drum. This chute is rigidly secured to and revolves with the drum.

During the mixing process a door, pivotally mounted within the drum, covers the opening of the chute. This door-covered chute and the two plates mentioned in the claim assist in the mixing process. When it is desired to discharge the mixture, the door is thrown open by means of a lever outside the drum, and the door then bears against the radial plate. A flange along the inner edge of the door co-operates with the door, the radial plate and the diagonal plate in guiding the material into the chute. These parts obviously may be, and in practice are, so related to the capacity of the drum and the capacity of a barrow that at each revolution one barrow load is discharged, and so the workmen in file wheel away the mixed batch.

In the prior art we find nothing that denies the patentable novelty of this combination of means. Patents to Ransome, No. 322,006, No. 804,803, and No. 870,797, to Burns, No. 661,487, and to Roberts, No. 845,435, are not pertinent, because the discharge spouts are not attached to and do not revolve with the drum. McKelvey's patent, No. 751,541, is for a rotary feeding device for concrete mixers. This contains a chute which is rigidly attached to and revolves with the drum of the feeder and extends from the interior of that drum into the "high-charging" opening of a mixing drum of the prior art. The mouth of the chute is the full width of the feeder. Along one edge of the chute within the feeder a door is pivotally mounted. This door is rectangular in shape, and extends axially from side to side of the feeder and radially from its hinge to the periphery of the feeder. While the concrete materials are being dumped into the "low-charging" opening of the revolving feeder, the door is held over the mouth of the chute by means of a lever that extends outside the feeder. When the materials are to be fed into the mixer, the door is thrown open till it bears against lugs on the interior of the feeder's periphery. As the feeder revolves, the door lifts and throws the materials into the chute and thence into the mixer. McKelvey's feeder, as he suggests, could itself be used as a mixer by providing it with the customary mixing plows and blades. Granting full weight to the Standard Company's assertion that McKelvey, therefore, shows a concrete mixer embodying a combination of a revolving drum, a chute attached to and revolving with the drum, and a door pivotally mounted within the drum, and adapted to open and close the chute and to guide the material into the chute, we agree with the trial judge that the McKelvey disclosure does not forestall the Cropp concept. Cropp's claims, read in the light of his description and drawings, call for a chute that extends but a little way into the drum, and is so associated with the door, the flange, the radial plate, and the diagonal plate that the combination constituting the discharging means does not impede or interfere with the charging and mixing means at the other end of the drum, but, on the contrary, co-operates in the final stages of the mixing, does not form a dam across the stream, but only a wing dam, and does not lift up and expel the entire contents at a single throw, but is so proportioned to the capacity of the drum that only a predetermined fraction is discharged in one revolution; and inasmuch as the conception of this result and of the mechanical combination to produce it is not found in the prior

art, there is no basis for rejecting the Patent Office's attribution of this achievement to the creative imagination of an inventor.

[2] The question of infringement is really narrowed to claim 1. In Cropp's drawings and description, and in his commercial structure, the chute is segmental in cross section and is tapered inwardly; the door has its free end cut to match the taper of the chute; and the radial plate is tapered to correspond with the tapered end of the door. Claim 1 calls for the tapered chute and door. In the Standard Company's machine the chute is tapered, but the door is rectangular and more than covers the mouth of the chute. With the use of a rectangular door a large part of the radial stop plate may be and is dispensed with; and the flange along the inner edge of the door has been taken off and fastened to the edge of the chute. When the Standard Company's door is shut, all the Cropp functions are performed. When it is opened, the superfluous metal of the rectangular door does service for the omitted portion of the radial stop plate; the diagonal plate performs its regular office; the flange operates in the same way; and all together, the chute, door, flange, stop plate, and diagonal plate constitute a wing dam, that divides, directs, and discharges the mixture in substantially the same way as does Cropp's wing dam. Even claim 1 is entitled to a range of equivalency that embraces such colorable changes.

In No. 2526 the decree is affirmed; in No. 2527, the decree is reversed, with the direction to enter a decree for an injunction and an accounting with respect to claim 9.

(256 Fed. 670)

GEOGHEGAN et al. v. ERNST.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 176.

1. PATENTS ⟹226—INFRINGEMENT—WHAT CONSTITUTES.
   If a patent claim reads upon an offending apparatus infringement is suggested, although not proved, but there is no infringement if the claim will not read upon that which is said to infringe.

2. PATENTS ⟹328—VALIDITY—INFRINGEMENT—HOISTING APPARATUS.
   Rutan patent, No. 1,170,193, claims 1, 2, and 3, for hoisting apparatus, *held* valid, but not infringed.

Appeal from the District Court of the United States for the Western District of New York.

Suit by Charles A. Geoghegan and others against Charles K. Ernst. Decree for defendant, and plaintiffs appeal. Affirmed.

Appeal from decree in equity entered in the District Court for the Western District of New York.

Action is upon claims 1, 2, and 3 of patent to Rutan, dated February 1, 1916, No. 1,170,193. Of these claims the first is most general, and is as follows:

"1. In a device of the character set forth, a hoistway, hoisting apparatus therein having a vertically movable standard, means for elevating said standard, vertically swinging doors covering such hoistway, means depend-

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing within the hoistway and means pivotally supported thereon and pivotally connected with each other and with said doors and co-operating with said standard for automatically operating the doors."

The object of invention (as stated in the disclosure) is to provide means whereby a hoisting apparatus in a cellar may be extended upward above the sidewalk level, automatically opening the cellar door when it rises, and securely closing the door upon its descent. The invention is said to consist in "certain novel features of construction and arrangement by which" the foregoing objects are attained.

In practical application the inventor has produced an ash hoist which opens and closes the door in a city sidewalk through which it appears to do its work.

It is not asserted that any invention lies in the hoist. Any kind of hoist actuated in any manner may be used; but the specification dwells upon the connection, interrelation, and co-ordination of any hoist capable of ascending through the sidewalk aperture and the door or doors which normally cover the hole in the pavement, and indeed form a portion of that pavement.

The disclosed and described connection between hoist and door consists essentially in a downward extension of the frame surrounding the open hoistway, to which extension is attached a lever raised and lowered by the ascending or descending hoist, or some portion thereof, to which lever is pivoted a link, which link is also pivoted to an appropriate extension of the door.

Thus the upward or downward movement of the lever, when actuated by the ascending or descending hoist, communicates the energy of the hoisting apparatus through the link (connecting the lever and door) to the door itself, and moves it in accord with the vertical movements of the hoist.

The disclosure of the patent is confined to a hoistway with two doors; and that word is in the plural throughout all the claims in suit. But it may be assumed with the plaintiffs that, with no other modification than would occur to any competent mechanic, the device is applicable to a single door.

Defendant's alleged infringement is a simple hand hoist whose rising standard is connected with a single cellar door by a link pivoted at one end to the hoist and at the other to the door. It is mechanically operable but crude, and, if the standard should ever get "out of plumb," would become mathematically impossible.

The lower court overruled the defense of anticipation, sustained that of non-infringement, and dismissed the bill. Plaintiffs bring this appeal.

W. P. Preble, of New York City, for appellants.

Wilhelm & Parker, of Buffalo, N. Y. (Charles W. Parker, of Buffalo, N. Y., of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Whenever defendant's machine works it opens the door, through which the telescopic ash hoist is to project itself, by a straight thrust. It has no lever and nothing wherewith to exert leverage. This is a fundamental difference between the two pieces of apparatus.

If it be attempted to read the first claim of Rutan's patent upon Ernst's device, the latter is found to have no "means depending within the hoistway" upon which other means are "pivotally supported," which latter means are "connected * * * with said door's." Consequently Ernst has not "depending means" and "pivotally supported means" co-operating with a standard in order to automatically operate a door.

[1] If (as has been often said) a claim reads upon an offending apparatus, that fact suggests but does not prove infringement; but

if a claim will not read upon that which is said to infringe, there can be no infringement.

There are many reported instances of most benevolent reading of claims to bring that which really copies a man's invention within the scope of an inartificially drawn definition, i. e., claim.

[2] But in this instance the claims are accurate, and assumed their present shape after applicant had demanded as his most general claim the following:

"In a device of the character set forth, a hoistway, hoisting apparatus therein having a vertically movable standard, means for elevating such standard, doors covering such hoistway, and mechanism actuated by such elevating means for automatically operating said doors."

In other words, Rutan thought himself entitled to prevent any one else from opening a door or doors over a telescopic hoist by means of any mechanism obtaining its power from the rising hoist itself.

He had no right to such claim, and was told by the examiner that "claims should be limited to what applicant has actually invented." He did invent, and was entitled to a patent for, the embodiment of the idea of opening the door by means of a link actuated by a lever, which in turn was driven by the rising hoist. But the general idea of pushing up a cellar door by a rising standard was old with Berry & Gale No. 740,080, and the same idea, for the specific purposes of an ash hoist, had been shown by Sundh No. 955,922. If Rutan had obtained and been entitled to the claim he asked for but did not get, Ernst would have infringed; as it is, he does not.

We therefore agree with the court below that within the scope of the very precise claims in suit, the Rutan patent is valid; but no infringement is shown.

Decree affirmed with costs.

Fed. 721)

SOTELLO v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1919.)

No. 3235.

1. NEUTRALITY LAWS ⟹5—EVIDENCE—SUFFICIENCY.

Evidence that accused was taking some 2,000 rounds of ammunition on a mule toward a river crossing on the Mexican boundary, from which he was some 300 yards distant, etc., *held* to sustain conviction under Comp. St. §§ 7677, 7678, relating to transporting war munitions for export.

2. CRIMINAL LAW ⟹822(16)—INSTRUCTIONS AS A WHOLE—REASONABLE DOUBT.

Instruction in criminal case, defining reasonable doubt as doubt for which sensible man could give good reason, based on evidence or want of evidence, *held* not erroneous, when construed as a whole; it being stated in the same sentence that it was such doubt as sensible man would act or decline to act upon.

Batts, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Texas; W. R. Smith, Judge.

Severo Sotello was convicted of transporting munitions of war for export. and brings error Affirmed.

Harry C. Miller, of El Paso, Tex. (G. Volney Howard, of El Paso, Tex., and J. Dean Gauldin, of Dallas, Tex., on the brief), for plaintiff in error.

R. E. Crawford and W. H. Fryer, Asst. U. S. Attys., both of El Paso, Tex.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This is a writ of error to obtain a review of a judgment of conviction on an indictment which charged that the plaintiff in error, "Severo Sotello, did unlawfully, willfully, knowingly, and with intent to export the munitions of war hereinafter described, from said county of Presidio, state of Texas, to and into the United States of Mexico, the exact point in said United States of Mexico being to your grand jurors unknown, and hence not here set forth, make a shipment of certain munitions of war, to wit, about two thousand (2,000) rounds of rifle cartridges, a further and more detailed description thereof being to your grand jurors unknown, and hence not here set forth, by transporting the same from some point in the county of Presidio, in the state of Texas, the exact location of which is to your grand jurors unknown, and hence not here set forth to a point in Presidio county, state of Texas, the exact location of which is to your grand jurors unknown, but which is located at a point about 12 miles northwest of the town of Presidio, in the county of Presidio, and state of Texas, and about five hundred (500) yards from the international boundary line between the United States of America and the United States of Mexico, with the said unknown point in the United

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States of Mexico as the destination thereof." U. S. Comp. St. §§ 7677, 7678; United States v. Chavez, 228 U. S. 525, 33 Sup. Ct. 595, 57 L. Ed. 950.

[1] An assignment of error based upon the action of the court in overruling a motion that a verdict of not guilty be directed is sought to be supported on the ground that the evidence adduced was insufficient to support a verdict of guilty. Two witnesses testified for the prosecution, John Black, a corporal, and J. D. Marcom, a horse-shoer, in the Sixth Cavalry. The following are extracts from the testimony of the first-mentioned witness:

"I am stationed at Indio, Tex., 22 miles out from Presidio. I recall taking the defendant into arrest about the 21st day of September. The morning of September 21st I was going to Presidio on my own business, and about 10 miles out of camp, at a place where we always look for smugglers, I saw this Mexican coming along. When he saw me he started to take a trail northwest of the river, and I rode on and spoke to him. I turned and held him up, and he didn't want to show me what he had in his bag; but I made him hand it over and then Horse-Shoer Marcom and another special patrol came along, and I delivered him over to be searched. Horse-Shoer Marcom searched him and found the ammunition, a sack full, and also a box. He was traveling on a Spanish mule. He had the ammunition thrown over his saddle in a sack, with his coat thrown over it. I didn't open it myself; there was ammunition in it. * * * This man was about 12 miles from Presidio. It was about 300 to 500 yards from the boundary line the first time I saw him. He was going in a northwestern direction. There is a place near where this man was where the river can be crossed, and he was approaching the crossing. This was in Presidio county. * * * This man was carrying the ammunition on a mule and was riding the mule. * * * There was about 2,000 rounds. * * * He was traveling northwest at that time. It is not a fact, if he was traveling in a northwesterly direction, that it would carry him away from the international boundary; it would carry him right over the border. I don't know that you can cross the river at most any place. They have regular fords, but they are full of quicksand. * * * There are not very many people down in that vicinity. There is some traveling, people going and coming from Mexico. * * * At the time I arrested this man he was not proceeding toward the headquarters of the captain; he was going in the opposite direction. * * * I do not know where the defendant lives. * * * Being right around in there, I know he didn't live anywhere the way he was going, or I would have seen him. I don't know of my own knowledge that this defendant did not live in the direction he was traveling; but, if he had lived in or around there, I would have seen him, as much as I have ridden the border. * * * There were bandits across the river in that vicinity."

In the course of the testimony of the other witness for the prosecution, he stated that he examined the defendant and found some ammunition, Mauser rifle cartridges, on the front of the mule, that he never saw the kind of ammunition he had used for sporting rifles, and that the defendant was about 300 to 500 yards from the boundary line at the time he was arrested. There was testimony to the effect that Mausers are used extensively by the Mexicans. The defendant was examined as a witness in his own behalf. In the course of his examination he stated that he was a farmer, that he lived on Stephen Ochoa's ranch, near Indio, Tex., and had lived there about 8 months; that before that he lived in Mexico, but had not been back there since he crossed over about 8 months before; that he found the ammunition hidden near the river on the side of the road that comes from Mexico;

that it was in a sack and thrown in some brush, right along the side of the road; that at the time he was arrested he was taking the ammunition to Indio camp to deliver it to the chief there; that when the soldiers were coming toward him he didn't take a trail; that he was not going toward the river; that he did not speak any English; that he had friends on the other side of the river; that some friends cross the border and visit him; that he knew one bandit over there, but had not seen him for about a year.

We think circumstances which evidence adduced disclosed were such as to support an inference that the destination of the ammunition which the defendant was carrying was Mexico. It was open to the jury not to credit the defendant's explanation of his possession of the ammunition, and to find from testimony in conflict with his that he was going toward Mexico, and not toward Indio camp. The quantity and kind of ammunition found in the defendant's possession, the place at which he had it, the direction in which he was going, the fact that he had lived in Mexico and had relations with persons living there, his conduct when the presence of the soldiers became known to him, and what he testified to by way of explaining his conduct, were circumstances shedding light on the question whether the destination of the ammunition was or was not Mexico. The conclusion is that there was evidence to support the material averments of the indictment, and that the court did not err in overruling the motion for a directed verdict of not guilty.

[2] It is assigned as error that the court, in charging the jury upon the question of reasonable doubt, said that a reasonable doubt must be a doubt for which a sensible man could give a good reason, which reason must be based upon the evidence or the want of evidence. The following is the part of the court's charge which dealt with the subject of reasonable doubt:

> "The defendant in this case is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and if you have a reasonable doubt of his guilt you should acquit him. By reasonable doubt you will understand that the court does not mean fanciful conjecture which an imaginative man may conjure up, but the doubt which reasonably flows from the evidence, or the want of evidence, and a doubt for which the sensible man could give a good reason, which reason must be based on the evidence, or the want of evidence, such a doubt as a sensible man would act upon or decline to act upon in his own concerns. If you have such a doubt, the defendant is entitled to the benefit of that doubt and you should acquit him; but if you are satisfied from the evidence that he is shown to have committed the offense with which he is charged, you should find him guilty."

The part of the instruction of which complaint is made was qualified and explained by the language which immediately followed it, forming a part of the same sentence—"such a doubt as a sensible man would act upon or decline to act upon in his own concerns." The instruction as a whole was such as to make it known to the jury that it was their duty to acquit the defendant, if the evidence left them with such a doubt of his guilt as a sensible man would act upon or decline to act upon in his own concerns. The instruction as a whole was such that

the defendant could not have been prejudiced by it. Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708.

Of other rulings complained of no more need be said than that no one of them constituted reversible error.

The judgment is affirmed.

BATTS, Circuit Judge (dissenting). The question raised as to the abstract accuracy of the charge upon reasonable doubt should occasion little concern. The errors into which good judges not infrequently fall, disclosed only by minute examination of the language used, and consisting of departures from the verbal niceties, can have little effect in preventing the fair trial the law should insure. A matter of much greater importance is presented in the instant case in a consideration of whether that part of the charge upon reasonable doubt which is unquestionably correct has had a proper application by the jury. The existence of the basic principle that a person accused of crime is presumed to be innocent until his guilt is established beyond a reasonable doubt could hardly be inferred from a consideration of the evidence and verdict. Nor is there anything to indicate that the correct charge upon circumstantial evidence has been given the weight to which experience has shown it to be entitled.

The trial judge charged the jury upon the law of circumstantial evidence as follows:

> "In a case depending on circumstantial evidence, you are instructed:
>
> "First, that the hypothesis of guilt of the offense charged in the indictment must flow naturally from the facts proved and be consistent with them all; and
>
> "Second, the evidence must be such as to exclude every reasonable hypothesis but that of guilt of the defendant of the offense imputed to him; or, in other words, the facts proved must all be consistent with, and point to, guilt only, and must be inconsistent with innocence."

The facts have been detailed in the opinion of the court. They do not show that a crime of any kind was committed. Each fact proved is consistent with the nonexistence of crime. Each fact proved is consistent with the innocence of defendant. All the facts, taken together, neither show defendant's complicity in crime nor the existence of crime. Moreover, it is submitted that no person, reading the statement of facts only, could use the standard number of guesses and name the offense of which defendant has been found guilty.

All of the facts from which there is any possibility of inferring crime, or defendant's connection with it, are:

A soldier was going to Presidio on his own business in the morning, and "about 10 miles out of camp," where the soldiers "always look for smugglers," he saw defendant "coming along," going in a northwest direction. The defendant, a Mexican, when he saw him, "started to take a trail northwest of the river." The soldier "rode on and spoke to him, and turned and held him up." He "did not want to show the soldier what he had in the bag." Other soldiers "came along," and the Mexican was searched and some cartridges of different makes were found. The Mexican was on a Spanish mule, and the ammunition was "on the front of the mule," in a sack thrown over the saddle, with a

coat over the sack. There were about 1,500 or 2,000 cartridges, some of them Mauser cartridges of German make. The place was from 300 to 500 yards from the boundary line, which was in a northwest direction. There was a place near where the river could have been crossed. "He did not seem to want to say where he got the ammunition, or where he was going, if he could say." There were bandits across the river in Mexico.

The charge against defendant is not smuggling goods into this country, or receiving stolen goods. It is charged that defendant did, "with intent to export munitions of war from Presidio county, Tex., into the United States of Mexico, make a shipment of certain munitions of war." After proof of the facts foregoing, and of no other pertinent facts, defendant asked for an instructed verdict, which was denied.

The presence, in the daytime, of a Mexican and a mule and some cartridges on a public road hardly evidences a crime. That the Mexican "started to take a trail," "didn't want to show what he had," and did not want to explain where he got the ammunition, "if he could say," could scarcely be held to supply or evidence a criminal motive. Nor would the facts that the cartridges were of German make, and that the road was near, and parallel with, the Rio Grande, beyond which there were bandits, seem to be facts from which "the hypothesis of guilt" "would flow naturally."

The defendant testified in his own behalf, and stated that he was a farmer who had come from Mexico and resided in Presidio county, without returning into Mexico, for about 8 months before his arrest; that the ammunition was in a sack which had been thrown in some bushes along the side of the road where he found it; that he was on the way to visit relatives; that he was going to deliver the cartridges "to the chief at the Indio camp"; that there was nothing to keep him from crossing the river at the point where he found the ammunition; that the river can be crossed at most points; that, while there was quicksand, it was not deep or dangerous; that he was traveling the public road to Indio when arrested; when the soldiers came up he showed the ammunition without objection; he knew some Villistas during the revolution; he knew an outlaw in Mexico by the name of Cano; he could not speak English.

Apparently the jury did not believe the Mexican; possibly he did not tell the truth. If the charge had been theft, a statement by the defendant that the property in his possession had been found by him might not be accepted by the jury; but the statement would not supply the necessary proof that a theft had been committed. The fact that a theft had been committed having been established, and possession having been admitted, and defendant's statement as to the manner of acquisition not being accepted, a verdict of guilty might naturally follow. In the instant case, however, the fact of the crime cannot be inferred from defendant's possession, and, there being no other evidence of crime, neither the possession nor the statement as to the circumstances of acquisition can establish defendant's connection with a crime not shown to have been committed. If the statement were true, guilt could not be predicated of the fact; if it were not true, guilt of the crime

charged would not be a logical conclusion. Accepting as true all the evidence of the government, and as false all the testimony for defendant, there could be no legitimate inference of defendant's guilt, in the absence of proof that a crime has been committed.

If the defendant had been charged with a violation of the law with reference to the importation of goods into this country, the evidence would have made certainly as strong a case against him. Assuming crime from the facts, it is not possible to say whether he was guilty of this offense, or of the offense charged.

Some circumstances strongly suggest the absence of crime of any kind. Shipment of contraband goods into Mexico would not seem to be an industry to be conducted in the daytime, along the established and patrolled public roads. When seen by the soldiers, defendant made no effort to escape. The country abounds in trails, and the river has many crossings. The hours of the night are as available for crime there as elsewhere.

However, the American system of criminal procedure does not place upon the person accused the obligation of establishing his innocence. The underlying principles have in contemplation the double purpose of preventing oppression and punishing crime. There has been no recognition of the fact—at least, no formal recognition—that the fundamental rules formulated to secure American liberty and enforce American law do not extend all the way to the Rio Grande.

(256 Fed. 726)

SULLIVAN v. METROPOLITAN CASUALTY INS. CO. OF NEW YORK.

(Circuit Court of Appeals, Fifth Circuit. April 7, 1919.)

No. 3265.

1. LIBEL AND SLANDER ⟹25, 41—PRIVILEGE—PUBLICATION—LETTER BY INSURER.

   A casualty insurer's writing of a letter to a policy holder, setting out the grounds on which his claim was declined, and its delivery of the letter through its local attorney, the letter not being sealed, but open for the attorney's inspection, was privileged, though the contents of the letter were libelous, and there was no publication.

2. ATTORNEY AND CLIENT ⟹102—LIBEL—UNAUTHORIZED PUBLICATION.

   Where a casualty insurer sent its local attorney a letter declining to pay a policy holder's claim for loss, which letter was libelous, the insurer was not liable to the policy holder for its attorney's unauthorized act in showing the letter to a third person; the attorney alone being liable.

3. LIBEL AND SLANDER ⟹112(1)—PUBLICATION OF LIBELOUS LETTER—SUFFICIENCY OF EVIDENCE.

   In a policy holder's action for libel against a casualty insurer, evidence *held* not to justify finding that, when the insurer's attorney exhibited to a third person the insurer's libelous letter declining to pay the policy holder's claim, the attorney was interviewing the third person to get his statement in aid of the insurer's defense against the policy holder, so that the attorney's act in disclosing the letter was authorized, and constituted a publication.

   Batts, Circuit Judge, dissenting.

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In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Suit by J. B. Sullivan against the Metropolitan Casualty Insurance Company of New York. Judgment for defendant, and plaintiff brings error. Affirmed.

William H. Watkins and Garland Q. Whitfield, both of Jackson, Miss. (Hilton & Hilton, of Mendenhall, Miss., on the brief), for plaintiff in error.

R. G. Brown, of Memphis, Tenn. (Brown & Anderson, of Memphis, Tenn., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The plaintiff in error sued the defendant in error for an alleged libel contained in a letter addressed to the plaintiff by the defendant, declining a claim for indemnity under a policy held by plaintiff with the defendant. At the conclusion of the evidence the District Judge directed a verdict for the defendant, and from the judgment thereon this writ of error is taken.

[1] By concession of counsel, the record presents the single question as to whether or not there was a publication of the alleged libel. The letter was dictated by an officer of the defendant who lived in New York. No claim is made that the dictation was a publication. It was inclosed, with a letter to an attorney of defendant, under one cover, addressed to the attorney at his post office, Mendenhall, Miss. The letter to the plaintiff was contained in a separate envelope, which was addressed to the plaintiff, but was not sealed. It is not contended by the plaintiff, as it could not reasonably be, that the transmitting of the letter to plaintiff, through the local attorney, was a publication of it. The transaction declining plaintiff's claim required the tender of a return premium. Proof was necessary of the delivery of the letter, as well as of the tender. The attorney was entitled to read the letter, to enable him to testify to the identity of the letter, delivery of which accompanied the tender. The writing of the letter, setting out the grounds upon which the claim was declined, and its delivery in the method indicated, was privileged, and afforded plaintiff no redress, though the contents of the letter were libelous.

[2] The dispute arises over the conduct of King, the attorney to whom the letter was transmitted for delivery to plaintiff. Plaintiff's evidence tended to show that King, while the letter was in his possession, as yet undelivered, showed and read the letter to one Patterson. This is the act relied upon by the plaintiff as constituting a publication. King denied showing or reading the letter to Patterson. The District Judge directed a verdict upon the idea that, whether King disclosed the contents of the letter to Patterson or not, his doing so, if he did so, was beyond the scope of the authority conferred upon him by the defendant, and did not bind the defendant.

The circumstances, as detailed by Patterson, are these: The letter addressed to Sullivan, the plaintiff, was dated April 19, 1916, and in due course of mail would have reached Mendenhall about April 22d.

Patterson testified the letter was shown him about April 25th or 26th, and before its delivery to the plaintiff by King. His testimony is to the effect that he casually visited King's office, as they were friends, and in the course of a friendly talk the claim of plaintiff against defendant for insurance came up, and incidentally King told Patterson of the receipt of the letter, and, to gratify his curiosity, showed and read it to him. No business reason provoked the act, according to Patterson's evidence. The visit and conversation and the showing of the letter were altogether social, if Patterson is to be believed.

The first question presented is whether, under Patterson's version, the showing of the letter by King to Patterson was within the scope of his authority, and a publication of the alleged libel. The solution of this question depends upon the extent of King's authority. King had made an investigation of plaintiff's claim for the defendant, and had made a report of his investigation to the defendant, before the letter was written. After receipt of his report by the defendant in New York, the letter declining the claim was written to plaintiff, and forwarded to King for delivery to the plaintiff, with the returned premium. King's authority was limited to delivering the letter and making the tender, if the showing of the letter occurred in April, as testified to by Patterson. King was afterwards retained to help prepare and defend the suit which plaintiff brought to recover on his indemnity claim against the defendant. The subsequent employment could not reflect on the extent of his authority in April. One who is employed to make formal delivery of a notice and legal tender of an amount has no duty but to deliver the notice and offer the money. Anything that aids in the performance of those duties is within the scope of his agency, and, though done improperly, binds his principal. Anything done by the agent, which has not and is not intended to have any purpose to accomplish the delivery and tender, is aside from the authority conferred on the agent, and binds the agent only, and not the principal. If King, in delivering the letter to plaintiff, had unnecessarily disclosed its contents to another, his act might be binding on defendant, since he was doing what he was instructed and authorized to do, though doing it improperly. If King showed the letter to Patterson in a spirit of gossip, with no purpose to accomplish its delivery to plaintiff or aid in doing so, then his act was without his authority, not in pursuance of his agency, and fastened responsibility only upon himself.

The fact that his agency required him to have custody of the letter cannot alter the result. If a loss of the letter, resulting from King's negligent custody of it, and the consequent disclosure of its contents, could constitute a publication of it by the defendant, that is not this case. The disclosure in this case was caused by King's act in departing willfully from the performance of the agency intrusted to him, and using the letter for a purpose of his own, disconnected with any duties he owed defendant. It was not negligence on the part of the defendant to intrust King with the letter for delivery to the plaintiff. It is not claimed that King was incompetent or untrustworthy, or that defendant had any reason to suspect him. Intrust-

ing a competent agent with even a dangerous instrument does not make the principal liable to a third person for an injury done him by the agent with the dangerous instrument, willfully and while using it to accomplish his own purposes, and not in the business of his principal. Giving an agent an axe makes the principal liable to third persons, injured by its use by the agent, negligently or willfully, in the performance of his duties as agent. It does not make the principal liable if the agent, in a personal quarrel, not connected with his principal's business, injures another by the use of his principal's axe. If the principal is without fault in intrusting the agent with custody, liability must depend upon the agent's action, complained of, being shown to be constructively the principal's, because done in pursuance of his business. If done aside from the principal's business, for the agent's private and individual purposes exclusively, though done with the principal's instrumentality, it fastens no liability upon him. This follows, whether the instrumentality is dangerous or harmless. In this case, if Patterson is to be credited, King had departed entirely from the course of his agency in showing the letter to Patterson. His act in doing so was his own, and not the defendant's, and did not constitute a publication by the defendant.

[3] The plaintiff contends that Patterson's evidence as to what transpired when he says the letter was shown him should not have been looked to exclusively by the District Judge, and that, taken in connection with King's evidence, the jury might have legitimately inferred that King was interviewing Patterson for the purpose of getting his statement, in aid of the defendant's defense in the indemnity suit, brought or to be brought by plaintiff against it, and that the letter was shown Patterson as an outline of the defendant's proposed defense, and to assist him in making such statement. If the record is open to this construction, a different conclusion might be required. We do not think a fair construction of Patterson's and King's evidence admitted of such a construction. Patterson testified that nothing was said or done indicating that his statement was desired, or that business rather than gossip was responsible for the interview and exhibition of the letter to him. King denies that he ever, at any time, showed Patterson the letter addressed by defendant to the plaintiff. In this respect Patterson and King are in direct conflict. As a possible explanation of what King assumed to be Patterson's mistaken testimony, King testified that, some months after delivery of the letter by him to plaintiff, he had a conversation with Patterson, after King's employment as attorney for defendant in the indemnity suit, in which he showed Patterson a letter from defendant, addressed, not to plaintiff, but to King, and which outlined the defendant's proposed defense to the indemnity suit.

The effect of this evidence of King was not to contradict Patterson's version of the conversation testified to by him, at which the letter to plaintiff was said to have been shown which King denied having had at all, but to put in evidence a different and subsequent conversation, for the purpose only of suggesting a possible source of confusion, which might account for what King considered Patterson's

mistaken testimony. Patterson was not examined in rebuttal as to whether or not he had ever had a conversation of the kind testified to by King, at which a letter from defendant to King was shown him. The interview which King testified he had with Patterson occurred at a different time, concerned a different subject-matter, and involved a different letter, and has no mark of identity with the interview that Patterson testifies to, except that at each a letter, though a different one, was exhibited. Patterson asserted, and King denied, entirely the occurrence of the first interview. King's evidence as to the subsequent interview did not serve to qualify what occurred at the first, because it described a separate and different one, but only to corroborate King's denial of the occurrence of the first, by suggesting the possibility of Patterson's having become confused by the second into mistakenly believing the happening of the first.

In this situation there was a direct contradiction as to whether or not the first interview occurred; there was no contradiction as to what happened at it, if it did occur, since Patterson's testimony was the only testimony that referred to and described it. The jury would not have been authorized to accept Patterson's evidence that the first interview did occur, disregard his evidence as to what transpired at it, and adopt, as having formed part of it, incidents which King testified occurred at another and different interview. The record is susceptible only to the construction that, if an interview occurred at which the letter to plaintiff was exhibited, it occurred as testified to by Patterson, and under circumstances, therefore, which did not make the defendant liable for the showing or reading of the letter alone complained of in the declaration. No charge is made in the declaration based on the publication of a letter written by defendant to King, and it would not justify a recovery, though libelous, for that reason.

Reaching the conclusion that the District Judge rightly directed a verdict for the defendant, the judgment is affirmed, with costs.

BATTS, Circuit Judge (dissenting). The evidence required the submission to the jury of the issue as to whether Attorney King showed the libelous letter to Patterson while discharging the duties and within the scope of his employment.

(256 Fed. 731)

PASS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3242.

1. CRIMINAL LAW ⟹406(2)—EVIDENCE—ADMISSIONS WHILE IN CUSTODY.
In a prosecution for having violated the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k), testimony of a secret service agent as to admissions made by defendant after his arrest *held* admissible; there being no evidence of any substantial character tending to show force or threats against defendant or inducement offered him by government agents.

2. CRIMINAL LAW ⟹371(1)—EVIDENCE—OTHER OFFENSES—LEAFLET CIRCULATED BY DEFENDANT—GOOD FAITH.
In a prosecution for violation of the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k), where defendant testified that he acted in good faith in registering at a place other than his alleged permanent home, a leaflet advocating resistance to conscription was admissible, where there was evidence to show that defendant was one of those directly responsible for its publication.

3. ARMY AND NAVY ⟹20—SELECTIVE SERVICE LAW—REGISTRATION OTHER THAN AT DOMICILE—EVASION OF SERVICE—QUESTION FOR JURY.
In a prosecution for violating the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k), whether defendant, domiciled with his parents in Seattle, Wash., by registering with a local draft board in Idaho while on his way to New York to study, had intended to evade military duty, *held* for the jury under the evidence.

4. ARMY AND NAVY ⟹20—SELECTIVE SERVICE LAW—EVASION—INSTRUCTION.
In a prosecution for violating the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k), instruction *held* fairly to present the main issue whether defendant, domiciled with his parents in Seattle, Wash., intended to evade military service when he registered with a local board in Idaho while on his way to New York to study.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Morris Pass was convicted of having violated the Selective Service Law, and he brings error. Affirmed.

Winter S. Martin and Wilson R. Gay, both of Seattle, Wash., for plaintiff in error.

Clarence L. Reames, Sp. Asst. Atty. Gen., Robert C. Saunders, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., all of Seattle, Wash.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Morris Pass was convicted of having violated sections 5 and 6 of the Selective Service Law, approved May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. 1918, §§ 2044e, 2044f]), in that he willfully failed and refused to present himself for registration at Seattle, his permanent home and actual place of registration, and to submit to registration, on June 5, 1917.

The evidence showed these facts: Pass was 23 years old at the time of the trial in February, 1918, was an unnaturalized alien, born in Russia, and in 1904 came to the United States with his parents. The

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family landed at New York and went directly to Columbus, Ohio, where they stayed one year. In 1905 they moved to Cleveland, where they remained until 1913, when the father went to Seattle, Wash., and at the end of a year defendant, together with the rest of the family, joined the father in Seattle. Morris remained in Seattle 7 or 8 months, and then went to New York to study painting, and stayed there about 1 year and 3 months, or until September, 1916, when he returned to Seattle, where he remained with his parents until the latter part of May, 1917.

At that time he and his brother, Joe Pass, left Seattle for New York, and worked their way from place to place. Defendant reached Sand Point, Idaho, on the evening of June 4th or morning of June 5th. He testified that he conferred with the local board of registration at Sand Point and was advised to register there, and that he did so, under the name of Morris Levine; that he left Sand Point on the afternoon of June 5th and went to Montana, going from there to New York, arriving about the middle of September, 1917; that in New York he lived at 16 Christopher street, under the name of Morris Pass, but received his mail at the general delivery; that he remained at Christopher street for about 3 weeks, or until October 13th, when he was arrested; that he did not consider New York as his permanent residence, but merely a place where he would study, and that after leaving Seattle he had not established a permanent residence; that he considered his residence wherever he was, where he slept and was doing his business. "I registered in Sand Point, because I did not consider Seattle my place of residence. I considered myself a migratory worker, which I was."

[1] It is contended that the court erred in permitting a witness to testify to certain admissions made by defendant when in New York. The witness was a United States secret service agent, who met Morris Pass in June, 1917. Counsel for the government asked the witness whether he had heard the defendant make any statement with reference to his registering or failing to register under the Selective Service Act. Counsel for the defendant was given permission to interrogate the witness as to the circumstances under which any admissions or statements were made. The evidence given was to the effect that Pass, after his arrest, stated that he had resided in Seattle; that he had remained there until May, 1917; that he had not registered at any place, and was somewhere in Montana on June 5, 1917; and that he was a conscientious objector. There was no evidence of any substantial character which tended to show force or threats against Pass, or inducement made or offered to him by the agents of the government. The mere fact that Pass was in custody when he made the statements, and that they were answers to questions put by the agents, did not make such admissions involuntary. In Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, cited by defendant, the facts were very different. There the accused was in actual custody, was stripped of his clothing, and was nagged and told by the detectives that an eyewitness charged him with guilt, and that if he had an accomplice he should say so, and not have the blame of the "horrible

crime" on his own shoulders. In Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262, the court, in discussing the admissibility of a confession, said:

"The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion." Sparf v. United States, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343.

[2] It is said that the court erroneously admitted an exhibit and circular headed, "No Conscription! No Involuntary Servitude! No Slavery!" published on or after May 11, 1917. The circular, after setting forth that slavery was not permitted in the United States, went on:

"* * * Wake up! Stand by us now, for when we have become an army we will have ceased to think, and we will shoot you if told to shoot you. * * * Resist! Refuse! Don't yield the first step toward conscription. Better be imprisoned than to renounce your freedom of conscience. Let the financiers do their own collecting. Seek out those who are subject to the first draft. Tell them that we are refusing to register or to be conscripted, and to stand with us like men and say to the masters: 'Thou shalt not Prussianize America!'"

Below the main printing were the words, "Seattle Branch No Conscription League, P. O. Box 225."

It is doubtful whether exception was taken to the admission of the circular in evidence; but, assuming that the point was saved, there is no merit in it, for the reason that there was evidence which tended to show that Morris Pass was one of those directly responsible for the publication of the leaflet. We quote part of the cross-examination of defendant (Transcript, p. 54):

"Q. Where have you seen it prior to that time? A. Prior to that time I had seen it, I believe, on the streets in Seattle; also one on the porch at our house.

"Q. On the porch at your house? A. Yes sir.

"Q. I will ask you if you did not pay for the printing of that circular? A. No, sir.

"Q. Isn't it a fact that you gave to Hulet M. Wells a sum of money to pay for the printing of this leaflet? A. I didn't pay for them.

"Q. Did you give to Hulet M. Wells money to pay for the printing of this leaflet? A. The money was taken at a collection to pay for this leaflet.

"Q. Who collected that? A. The money was put on a table at a meeting which would pay for that leaflet.

"Q. And who took the money from the table? A. Part of it was taken by Mr. Wells; part of it I taken and gave to Mr. Wells later.

"Q. That was for the publication of this leaflet? A. Yes, sir."

Inasmuch as defendant testified that he acted in good faith in registering at Sand Point, Idaho, there was no error in admitting the circular as tending to negative his evidence of good faith. Moore v. United States, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996.

[3, 4] It is contended that there was no evidence to support the verdict of the jury. By the provisions of the Selective Service Law,

and under the executive proclamations and regulations prescribed under the authority thereof, registration was required on June 5, 1917, of every male person who on that date or theretofore should have attained his twenty-first birthday, and who on said date should not have attained his thirty-first birthday, registration to be made at the registration place in the precinct wherein the registrant had his permanent home and orders. The law provided for the benefit of registrants that—

"Those who expect to be absent on the day named from the counties in which they have their permanent home may register by mail, but their mailed registered card must reach the places in which they have their permanent home by the day named herein, June 5, 1917." Proclamation of the President of the United States, dated May 18, 1917.

There was evidence going to show that defendant had a permanent home and domicile in the city of Seattle on June 5, 1917, and that he had not abandoned it on that date. If, when he was at Sand Point, Idaho, on the night of June 4th or morning of June 5th, he had a plan to move on and migrate through other towns to his ultimate destination, New York, such a floating intention would not conflict with a domicile in Seattle. There is nothing to show that he had established a new residence in Sand Point; on the contrary, it is clear that he intended to move on to New York. The question was one for submission to the jury. The court fully explained the requirements of the law, and among other instructions said:

"* * * He was in Sand Point on the 5th day of June, and registered, not in his own name, known at his place of domicile, but under the name of Morris Levine, or Levene, stating that he had assumed the name as his traveling cognomen. * * * Now, you are instructed that the regulations further provide that when a man is absent from his domicile or permanent residence—actual residence—that he may register by mailing his registration to the registration board of his domiciliary precinct. The law makes it an offense to willfully fail to register. * * * So, on the morning of the 5th day of June and before, after issuance of the rules and regulations and after the passage of the law, he knew that he could register by presenting himself at the voting precinct within which his domicile is situated, and, if he was absent then, by mailing his registration to his precinct.

"Now the issue for you to determine is raised by this registration in Sand Point, Idaho. I have admitted in evidence the fact of his registration there, and all of the circumstances bearing upon his conduct and his intent which brought about that registration, for the purpose of permitting you to fairly consider all of the evidence that is before you to determine whether this defendant acted honestly at that time, and with an honest purpose and intent of complying with the law, whether his conduct at that time was with the purpose of perpetrating a fraud upon this act and the government, and with a view to evasion, so that he might not be called, or evade the call if he is certified, if his name is called, and still, if discovered, then have some thread upon which to predicate the idea of intention of faithful compliance with the law."

By this instruction the main issue was fairly presented, and after careful consideration of the whole record we are satisfied that defendant's rights were in no way prejudiced.

The judgment is affirmed.

(256 Fed. 735)

PASS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3243.

ARMY AND NAVY ⟹20—SELECTIVE SERVICE LAW—REGISTRATION IN CITY OF DOMICILE.

A resident of Seattle, Wash., where his parents lived, in so far as he had any domicile, who left his wife in the city and started to work his way to New York to study, by failing to register in Seattle under the Selective Service Law (Comp. St. 1918, §§ 2044a–2044k), violated such law, though he registered at a point in Idaho, and, if his failure to register in Seattle or his evasion of the requirements of the law was willful, he could be convicted.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Joseph Pass was convicted of having violated the Selective Service Law, and he brings error. Affirmed.

Winter S. Martin and Wilson R. Gay, both of Seattle, Wash., for plaintiff in error.

Clarence L. Reames, Sp. Asst. Atty. Gen., Robert C. Saunders, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., all of Seattle, Wash.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. By writ of error Joseph Pass asks reversal of a judgment of conviction under two counts of an indictment for having violated the Selective Service Law of May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. 1918, §§ 2044a–2044k]). The first count charged that he willfully failed and refused to present himself for registration at precinct No. 201, Seattle, on June 5, 1917, "that precinct then being the precinct wherein said Joe Pass then had his permanent home and actual place of legal residence, from which he was not then temporarily absent." By the second count Pass was charged with having willfully evaded the requirements of the Selective Service Law, in that he willfully and knowingly failed to present himself for registration. The defendant is a brother of Morris Pass, whose case we have heretofore decided. Pass v. United States, 256 Fed. 731, 168 C. C. A. 77.

The uncontradicted evidence was that Pass, who was 24 years old, was born in Russia and came to the United States with his father about 1904. He lived in Columbus, Ohio, for a year, and then in Cleveland, Ohio, for about 6 years. Pass then went to Seattle, where, in a few months, he was joined by his father's family. After living 5 or 6 months with his parents in Seattle, he went to Alaska, where he remained a little more than 3 years. He then went back to Seattle, where he again lived with his parents for 3 years. In 1915 he lived with a brother on Twelfth avenue, Seattle. In 1916 he lived with his parents at Fifteenth avenue, Seattle, and he continued to live there

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until May 31, 1917, when he was married. At the time of his marriage he gave his home as Cleveland, Ohio, although he had not lived there for more than 6 years before his wedding. On May 31st, with his brother Morris, he left Seattle with the plan of working their way to New York. The defendant's wife remained at Seattle. On the night of June 4, 1917, or the morning of June 5, they reached Sand Point, Idaho, and, according to defendant's testimony, after some conversation with the registration officials at Sand Point, and telling them that he had come from Seattle, but did not live in Idaho, and was going to New York, he registered at Sand Point under the name of Joe Levine. He left Sand Point for Montana on the afternoon of June 5th, and his testimony is that he did not live in the county where Sand Point, Idaho, is situated; that he lived at 16 Christopher street, in New York, but that he got his mail at the general delivery; that his purpose in going to New York was to study; that before he left Seattle he made no inquiries about registering, and did not know that he could register by mail; that he took the name Levine because of the manner in which he and his brother were traveling; they did not "look clean enough, and did not care to use the name of Pass"; that, although he was living with his parents in Seattle in 1917, he did not call it his residence or expect to live there; that when he was married he gave Cleveland as his home, "because he had lived there the longest since he had been in this country." Defendant said that he was opposed to the Draft Act.

The question presented is whether the District Court erred in charging the jury that upon the facts "as a matter of law the defendant had not established a domicile in Sand Point, Idaho," and that "the domicile of the defendant continued on the 5th day of June at Seattle and had not been changed," but that it was for the jury to determine whether, considering the conduct of defendant and all the circumstances before and after the registration, he willfully failed to register at the place of his domicile, or willfully evaded the registration law by his act in registering at Sand Point, Idaho; that if the jury believed Pass acted honestly and with bona fide intention of complying with the law, rather than willfully to fail to comply with it or evade its provisions, or if there was a reasonable doubt upon the point, he should be acquitted.

It is not controverted that by the terms of the law and under the proclamation of the President, dated May 18, 1917, the date of registration was fixed for June 5, 1917, and the place of registration for each person was in the precinct wherein such person had his permanent home, or that it was provided that "those who expect to be absent on the day named from the counties in which they have their permanent homes may register by mail, but their mailed registration cards must reach the place in which they have their permanent homes by the day named herein," which was June 5th. But defendant failed to register in person in the precinct in which he was living when he was in Seattle and failed to register therein by mail. His counsel, while admitting that the act and regulations "seem to contemplate that every man will have a permanent domicile," argue that there is a

fault in the law, in that there is "no account of the floater or migratory worker," who "resides where he is, whether his stay be long or short." The error of this position is in ignoring the established fact that when defendant left Seattle he resided there, and that there is no showing that he acquired any other residence or home, or that when in Sand Point he had any purpose other than to stop over temporarily and work his way along, so as to reach New York about September, there to remain to study for a time. He left his wife in Seattle, and his parents were there. In Mitchell v. United States, 88 U. S. (21 Wall.) 350, 22 L. Ed. 584, the Supreme Court followed the usual rule that a domicile once acquired is presumed to continue until it is shown to have been changed, and said:

"Where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation. To constitute the new domicile, two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except facto et animo. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject."

Merely calling himself a migratory worker, or saying that he had an indefinite plan to leave Seattle, would not change the fact that defendant had his domicile in Seattle. He surely could not claim Cleveland at his domicile, for he does not show that he had even a floating intention of going there, and there is no proof of any domicile other than Seattle. Gilbert v. David, 235 U. S. 561, 35 Sup. Ct. 164, 59 L. Ed. 360.

Our conclusion is that the District Court was correct in its statement of the legal status of defendant, and in defining the issues upon which the jury were to deliberate.

Affirmed.

(256 Fed. 737)

AMERICAN SMELTING & REFINING CO. v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1919. Rehearing Denied May 21, 1919.)

No. 5194.

1. RAILROADS ⟹133(1)—LEASE OF LAND—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES.

In a lease of land by a railroad company to a smelting company as site for a plant, reserving to lessor all tracks thereon, a provision by which lessor agreed to furnish material and lay all further tracks required by lessee, "and do all switching of its cars within its premises necessary in placing the same for loading and unloading freight or material therefor free of charge to said smelting company," *held* not to limit such free switching service to that of cars for actual load hauls from or to the plant, especially in view of a contrary practical construction by the parties during 30 years.

2. CARRIERS ⟹32(2)—INTERSTATE COMMERCE ACT—REBATES.

A provision in a lease of land by an interstate railroad company for a smelter plant site, by which in consideration of the rental, etc., it agreed

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to do intraplant switching of cars, wholly disconnected from their transportation over its road, free of charge, *held* not invalid as a device to cover the giving of rebates.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action at law by the Union Pacific Railroad Company against the American Smelting & Refining Company. Judgment for plaintiff, and defendant brings error. Reversed.

F. W. Lehmann, of St. Louis, Mo. (Crofoot, Scott & Fraser, of Omaha, Neb., on the brief), for plaintiff in error.

N. H. Loomis, of Omaha, Neb. (Edson Rich and C. B. Matthai, both of Omaha, Neb., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. The railway company, hereinafter called plaintiff, sued the smelting company, hereinafter called defendant, to recover the reasonable value of a so-called intraplant switching service performed by the plaintiff for defendant since July 26, 1912. The defendant answered the complaint, and the plaintiff filed a general demurrer to the answer.

A stipulation was filed waiving a jury and fixing the reasonable value of the services performed at $7,129.44, in case the court should decide the defendant to be liable. On the pleadings and the stipulation the case was submitted. The court found for the plaintiff and rendered judgment for the amount stipulated. The defendant assigns such ruling as error.

[1] So far as material to the questions raised, the complaint alleged the following facts:

"That at all the times mentioned herein plaintiff was engaged in the operation of certain lines of railroad extending from Council Bluffs, Iowa, and Kansas City, Mo., through the states of Nebraska, Kansas, Colorado, and Wyoming, to Ogden, Utah, and engaged as a common carrier in the interstate transportation of freight and passengers over said railroad lines.

"That at all the times mentioned herein defendant was engaged in the operation of a smelting plant located in the city of Omaha, Neb., occupying grounds of the extent of approximately 19 acres, connected by spur and switch tracks with the main tracks of plaintiff's railroad line through said city of Omaha, and having within said plant grounds railroad tracks connecting the various buildings and other parts of said plant as means and facilities for the convenient and economical handling of ore, bullion, coal, and other materials from point to point within said plant in the operation thereof.

"That in the prosecution of its said business defendant was at all the times mentioned herein, a large shipper of freight in interstate commerce over the railroad lines of plaintiff, shipping ore and other materials to said Omaha plant from points in states other than Nebraska, and shipping from said Omaha plant the products thereof to points in states other than Nebraska, and that defendant has paid for all said interstate transportation performed for it by the plaintiff the rates prescribed therefor by the tariffs published by the plaintiff and filed with the Interstate Commerce Commission.

"That at the special instance and request of defendant the plaintiff has continuously from the 26th day of July, 1912, to the 30th day of June, 1916, inclusive, rendered and performed for defendant certain work, labor, and services (hereinafter referred to as 'intraplant switching service') consisting of

the switching and movement of cars, both loaded and empty, by means of a switch engine furnished and operated by plaintiff and the labor of an engine crew and yard crew furnished by plaintiff, from point to point within the grounds occupied by said Omaha plant of defendant, as directed by agents of defendant, over the trackage facilities maintained as aforesaid within said plant grounds; said switching and movement of cars being separate and apart from, and in addition to, any services rendered by plaintiff in and about the delivery to or acceptance from said plant of loaded cars in connection with and as a part of the transportation thereof from or to points beyond the plant limits or in and about the delivery to said plant of empty cars for loading or the removal therefrom of empty cars after unloading in connection with transportation to and from said plant.

"That the plaintiff published tariffs or rates and charges applicable to the transportation mentioned in the foregoing paragraph 6 hereof which contained no provisions concerning the aforesaid intraplant switching service, and no tariff published by the plaintiff and on file either with the Interstate Commerce Commission or with the Nebraska State Railway Commission during the times mentioned herein contained any provision concerning said intraplant switching service."

Without setting forth the allegations of the answer, it is sufficient to say that it alleged that the services, the value of which were sued for, were performed by the plaintiff under and pursuant to the terms of a lease entered into between the parties April 23, 1912, a copy of said lease being attached to the answer as an exhibit. By the terms of the lease the plaintiff, "for and in consideration of the covenants and agreements of the smelting company hereinafter written, as well as of the mutual covenants and agreements herein contained" (section 1, art. 2), leased to the defendant a tract of land in the city of Omaha, Neb., containing about 19 acres,

"excepting and reserving to the said Pacific Company the exclusive ownership, possession, right of possession and right to the exclusive use of all of the railroad tracks, side tracks and switches now upon, or which may hereafter, at any time during the term of this lease, be constructed in or upon the said premises, or any part thereof, the said premises and said tracks being further shown and described upon the map hereto annexed, marked Exhibit A and made a part hereof, and excepting and reserving further the exclusive right to said Pacific Company to lay down and construct, and thereafter maintain and operate any additional railroad tracks, side tracks and switch connections within and upon said premises, which the said smelting company may require to be laid or constructed for the hauling of its freight or material in the prosecution of the said business of the said smelting company upon the said premises.

"To have and to hold the same unto the said smelting company for the said term [January 1, 1937] for the purpose of maintaining and operating thereon its buildings and appliances now situated thereon, and any other such buildings and appliances as it may, during the term hereby created, erect thereon, and of conducting thereon the business of handling, smelting and refining ores, and doing such other business pertaining to or connected with the handling, smelting and refining of ores as said smelting company may, during the said term, engage in upon said premises."

Section 2, art. 2, of the lease, reads as follows:

"And for the consideration aforesaid the said Pacific Company covenants and agrees to furnish all material for and to lay upon the grading therefor, as hereinafter set forth, all necessary tracks over and upon said premises, which the said smelting company may require to be laid for the handling of its freight and material in the prosecution of its business and do all switching of its cars within its premises necessary in placing the same for loading and

unloading freight or material therefor free of charge to said smelting company."

The lease also provided that in consideration of the covenants and agreements thereinbefore mentioned on the part of the plaintiff, the defendant would pay the plaintiff, as compensation in respect of its said covenants, an annual rental in the sum of $5,000 until January 1, 1925; after January 1, 1925, to January 1, 1928, $6,000; after January 1, 1928, to January 1, 1931, $7,000; after January 31, 1931, to January 1, 1934, $8,000; after January 31, 1934, to January 1, 1937, $9,000. The record also shows that a similar lease so far as the questions now under consideration are concerned, had existed between the parties and their predecessors since April 23, 1886, and no charge had ever been made by the lessors for the intraplant switching service until the present suit was brought.

The plaintiff first contends that section 2, art. 2, above quoted, relates to the original construction of the tracks and the handling of freight and material incidental thereto, or, if this position is untenable, that the switching service must be limited to the switching of cars to actual road hauls; that is, the placing of cars for loading and unloading in connection with shipments beyond the plant. It is conceded that for 30 years, the parties have placed a different construction upon said section; but it is urged that such construction can have no weight because the section is unambiguous. Learned counsel, however, differ about its construction, and it is undoubtedly the cause of this lawsuit. We do not think it is unambiguous to the extent of excluding from our consideration the construction that the parties have placed upon the section during a period of 30 years.

But let us consider the section independent of the acts of the parties under the lease. Section 2, art. 3, of the lease provides that the defendant will pay the cost and expense incurred for the doing of the grading, for the construction of any additional tracks, side tracks, switches, or other railroad betterments in and upon the leased premises, the construction and operation of which may, at any time, be required by it from the plaintiff. By section 1, art. 2, such tracks, betterments and switches were to be and remain the property of the plaintiff. By section 2, art. 2, the plaintiff agreed to furnish all material for and to lay upon the grading above mentioned all necessary tracks over and upon said premises which the defendant might require to be laid for the handling of its freight and material in the prosecution of its business and do all switching of its cars within its premises, necessary in placing the same for loading and unloading freight or material therefor free of charge to the defendant. The furnishing of material, laying of all necessary tracks, and the switching service was to be performed for the "consideration aforesaid." Section 2, art. 2. The consideration thus referred to, is that mentioned in section 1, art. 2, above quoted, namely:

"The covenants and agreements of the smelting company hereinafter written as well as of the mutual covenants and agreements herein contained."

The words "free of charge" simply were added, in our opinion, to place beyond controversy the fact that the services mentioned were to

be without charge other than that specified in the covenants and agreements of the parties. We see no reason to limit the switching service to that required in the original construction of the tracks, as the plaintiff had agreed to furnish the material and lay the tracks and this would include such switching service as should be necessary to furnish the material and lay the tracks. Therefore the plaintiff having agreed to furnish the material and lay the tracks it would not have been necessary to again provide that the plaintiff should do the switching in connection with the laying of the tracks so we conclude the language in regard to switching cannot be confined to the switching required in the original laying of the tracks. Neither do we see any reason for limiting the switching service to the switching of cars for actual load hauls from or to the plant.

We take it that the plaintiff, under the facts disclosed in the record, would deliver to and accept from the defendant loaded cars, and place empty cars for loading, in connection with and as a part of the transportation thereof from or to points beyond the plant limits, without other charge than that embraced in its published tariff. If this be so, it was unnecessary to provide in the lease for that switching service; moreover, the allegations of the plaintiff's complaint absolutely exclude the service in question from any connection with transportation to and from the plant of the defendant in interstate commerce.

[2] We therefore are of the opinion assisted by the practical construction of the parties that section 2, art. 2, cannot be limited as the plaintiff seeks to limit it. The next contention of the plaintiff is that if the switching service, the value of which is sued for, is a service for which the covenants and agreements of the lease are the consideration, then the switching provision of the lease amounts to a device to conceal a rebate or concession and in this respect is void under section 2 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [Comp. St. § 8564]) and section 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act June 29, 1906, c. 3591, 34 Stat. 587 [Comp. St. § 8597]).

Of course an unlawful rebate or concession is just as much a rebate or concession whether covered or uncovered. It is more difficult to find, if covered. This is the only difference. We do not think the parties to the lease, if the provision in regard to the switching service is an unlawful rebate, intended to cover it, for instead of stopping where they well might have stopped, they proceeded to state just what the fact was. The question then before us is: Does section 2, art. 2, amount to an unlawful rebate or concession? In the consideration of this question it is apparent that this case is much different from those cases where unlawful rebates or concessions are usually considered. It lacks the presence of a competitive shipper complaining of discrimination, or the United States moving at the request of the Interstate Commerce Commission. The complaint of the plaintiff in paragraph 7 of the complaint also alleges:

"Said switching and movement of cars being separate and apart from, and in addition to, any services rendered by plaintiff in and about the delivery to or acceptance from said plant of loaded cars in connection with and

as a part of the transportation thereof from or to points beyond the plant limits or in and about the delivery to said plant of empty cars for loading or the removal therefrom of empty cars after unloading in connection with transportation to and from said plant."

By this allegation of the plaintiff, the switching service in question has no relation to or connection with transportation of passengers or property in interstate commerce and therefore in no view of the case could the provision in regard to the switching service be affected by the act to regulate commerce and the amendments thereto.

With reference to section 2 of the Interstate Commerce Act and section 1 of the Elkins Act, there is no evidence that the plaintiff, by performing the switching service in question, according to the terms of the lease, charges, demands, collects, or receives from the defendant a greater or less compensation for the transportation of passengers or property subject to the provisions of the act to regulate commerce, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. Nor is there any evidence that, by the performance of the switching service in question, the plaintiff offers, grants, or gives any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce, by it, whereby any such property is transported at a less rate than that named in its tariffs published and filed, or whereby any such other advantage is given or discrimination practiced in the transportation of property in interstate commerce.

The switching service in question is performed wholly within the state of Nebraska, and so far as this record is concerned is not connected with interstate commerce at all. Therefore the Interstate Commerce Act and its amendments are not applicable to it. We do not say that this lease between the plaintiff and the defendant may not, in a proper case, be shown to be an unlawful concession or rebate; all we say is that it is not shown in this case.

We are not unmindful that, although published rates may be collected on shipments transported, concessions and offsets may be extended by the carriers or the interests who control the carriers to favored shippers. These concessions and offsets are as pernicious as direct rebates, and it matters little whether they are in the form of cash payments, interest charges, royalty earnings, the use of valuable property at an inadequate rent, the free use of the carrier's funds or credit, or other insidious means, if they confer concessions and advantages which place certain shippers in a position of preference and advantage over competitors who are also customers of these carriers. Rates for Transportation of Anthracite Coal, 35 Interst. Com. Com'n R. 239. No competitor customer appears in this suit. It is true the Elkins Act aims to prohibit, not only discrimination between shippers, but any departure from the tariff rates published irrespective of its actual discriminatory effect. Vandalia R. Co. v. United States, 226 Fed. 713, 141 C. C. A. 469. But these tariff rates must be rates prescribed for the transportation of property or passengers in interstate commerce.

We may not stop to review the cases cited by counsel for plaintiff in support of the contention now under consideration. They have all been examined, and in every instance they present a case where a common carrier subject to the act to regulate commerce has done some act whereby the transportation of property or passengers in interstate commerce has violated the Interstate Commerce Act. The cases cited are Chicago & Alton Ry. Co. v. United States, 212 U. S. 563, 29 Sup. Ct. 689, 53 L. Ed. 653; Wight v. United States, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258; Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; United States v. Union Stockyard Co. of Chicago, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226; Phillips Co. v. Grand Trunk Western R. R. Co., 236 U. S. 667, 35 Sup. Ct. 444, 59 L. Ed. 774; Indianapolis Freight Bureau v. C., C., C. & St. L. Ry. Co., 16 Interst. Com. Com'n R. 254, 260; Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Moshassuck Valley Railroad, Second Industrial Railways Case, 37 Interst. Com. Com'n R. 566; Vandalia Ry. Co. v. United States, 226 Fed. 713, 141 C. C. A. 469.

Counsel for the plaintiff next contends that the switching service in controversy, while not a common carrier service in the ordinary acceptation of the word, is a special or independent service necessarily rendered by the same crews and equipment as the common carrier switching and is paid from out of operating revenue for which a reasonable charge must be made by the carrier. But here again we are met by the fact that the switching service, so far as the record before us is concerned is separate and apart from any service performed by the plaintiff in interstate commerce.

If this case was before the commission on an application to advance rates, or on the complaint of some shipper that the rates charged by the plaintiff were unreasonable, and it became material to inquire as to the sources of revenue of the plaintiff and the cost of the operation of its business, and the commission found that the service was without charge, it might say, as it often has said, You must make a charge for this service and publish it in your tariffs. But we have no authority to enter into such a discussion and there is no such case before us. We cannot find that the service is without charge when the whole lease is considered.

So far as the record before us is concerned, the subject-matter of the switching service was within the competency of both parties to make and is valid.

The judgment below is therefore reversed, and the case remanded, with instructions to dismiss the complaint.

(256 Fed. 744)

CALDWELL v. BLODGETT.

(Circuit Court of Appeals, Eighth Circuit. March 5, 1919.)

No. 4997.

1. APPEAL AND ERROR ⟹237(6)—REVIEW—ACTION TRIED TO COURT.

Where an action at law is tried in a federal court without a jury, and the legal effect of the evidence is not challenged by the defeated party, by motion for a finding in his favor or for a declaration of law of the same purport, the sufficiency of evidence to support special findings of fact cannot be considered by the appellate court, and all that can be reviewed is whether the special findings sustain the judgment, and whether during the progress of the trial errors of law occurred to which exceptions were preserved.

2. COVENANTS ⟹121(3)—EVIDENCE—FORMER JUDGMENT—MATTERS CONCLUDED—CONCLUSIVENESS.

A decree in a suit by a grantee of land by an unrecorded deed against his grantor and a subsequent mortgagee of the grantor and an assignee of the mortgage, holding the mortgage void and canceling the same, *held* conclusive as to the invalidity of the mortgage as between mortgagee and assignee in an action by the latter to recover over on a warranty in the assignment.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action at law by Alson Blodgett, Jr., against Ida M. Caldwell, executrix of the will of W. A. Caldwell, deceased. Judgment for plaintiff, and defendant brings error. Affirmed.

W. S. Lauder, of Wahpeton, N. D. (T. L. Brouillard, of Ellendale, N. D., on the brief), for plaintiff in error.

E. T. Conmy, of Fargo, N. D. (Watson, Young & Conmy, of Fargo, N. D., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges.

HOOK, Circuit Judge. Alson Blodgett, Jr., brought an action at law against Ida M. Caldwell, executrix of W. A. Caldwell, deceased, to recover the amount paid the deceased for a note and mortgage upon land in North Dakota, with interest from the time of payment. A jury was waived and the case was tried by the court. The court made special findings of fact and rendered judgment thereon for Blodgett. The executrix prosecuted this writ of error.

[1] At the threshold lies the question of the scope of our power of review. Upon the conclusion of the evidence at the trial the executrix made no motion for a finding, either general or special, in her favor, requested no declaration of law, nor otherwise challenged the legal effect of the evidence. Under such circumstances the sufficiency of the evidence to support the special findings that were made cannot be considered, and all that can be reviewed in an appellate court is whether the special findings, taking them as true, sustain the judgment, and whether during the progress of the trial errors of law occurred to which exceptions were preserved. Section 700, Rev. Stat. (Comp.

St. § 1668); Keeley v. Mining Co., 95 C. C. A. 96, 169 Fed. 598; Mason v. United States, 135 C. C. A. 315, 219 Fed. 547.

There are 22 assignments of error in the record. None of them contest the sufficiency of the findings to sustain the judgment, 17 relate to the admission and exclusion of evidence, 2 charge error in making certain findings presumably for insufficiency of proof, and 2 are simply that the court erred in rendering the judgment. The remaining assignment will be discussed presently. The long-established rules of appellate procedure in the courts of the United States prescribe definite requirements as to the character and contents of assignments of error for the record, and also the specifications in the briefs of those that are to be relied on in the appellate court. They have been the subject of very many decisions in this court, other Circuit Courts of Appeals, and the Supreme Court; but it appears that in the case at bar little attempt was made to comply with them. In a liberal view, in the interest of justice, there is but one question presented by an assignment of error that may be consistently considered. It is whether the trial court erred in holding that a judgment in a prior case concluded the executrix as to the matter there decided. A brief outline of the case at bar and the other case, as shown by the pleadings of the parties and the findings of the court before us, is essential to an understanding of the question.

[2] In his lifetime W. A. Caldwell loaned $4,000 to one Hall, and took his note and a mortgage on certain land, represented as belonging to the mortgagor, to secure it. Shortly afterwards Caldwell sold and assigned the note and mortgage to the plaintiff, Blodgett, for the face amount and accrued interest. The mortgage purported to be a first lien on the land, and Hall so covenanted, and also that the land was otherwise free of all incumbrances. The assignment to Blodgett contained a covenant by Caldwell that there was due upon the note and mortgage the full sum mentioned and interest to that time, and that he (Caldwell) had good right and lawful authority to sell and assign them in the manner adopted. By the terms of the assignment, in connection with those of the mortgage, Caldwell expressly warranted to Blodgett that the mortgage sold him was a first lien. There was also an implied warranty to the same effect growing out of the circumstances of the transaction. Furthermore, Caldwell believed he was selling, and Blodgett believed he was buying, a mortgage that was a first and only lien on the land. If it was not of that character the consideration failed.

It afterwards transpired that, about a year before Hall mortgaged the land to Caldwell, he sold it to one Quaschneck and gave him a contract for a deed, which the latter did not record, but under which he took open and exclusive possession of the property. Before discovering the existence of the mortgage Quaschneck paid Hall and those claiming under him nearly all the purchase price. Quaschneck then brought a suit in a state court of North Dakota to cancel the mortgage and quiet his title. The defendants in that suit were Blodgett, plaintiff here, the executrix, defendant here (Caldwell having died), and the trustee of the estate of Hall, who had been adjudged bankrupt. Both

Blodgett and the executrix filed answers, putting the averments of Quaschneck's complaint in issue, and participated in the trial. The case resulted in a decree for Quaschneck, quieting his title and expressly declaring the mortgage to be void and of no effect as a lien on the land. The executrix was awarded her costs upon the ground that she asked no affirmative relief. The decree was afterwards affirmed by the Supreme Court of the state. In the present case, brought by Blodgett to recover the amount he paid, with interest, the court below held that the decree of the state court estopped the executrix from questioning the invalidity of the mortgage as a lien. That ruling presents the question here.

In most of the cases in which a warrantor, indemnitor, or person in a similar relation has been held bound by the result of a suit involving a matter upon which his obligation to another depends, he was not a record party to the suit, but was either noticed or called in, or had information of its pendency, with opportunity to aid or participate in its conduct. An instance appears in Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298, and Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 427. There one Woodbury had sued and recovered judgment against the city of Chicago for injuries caused by his falling into an excavation in a public street in front of the property of Robbins, made by a contractor of the latter and negligently left unguarded. The city paid the judgment and sued Robbins for its loss. To hold Robbins to the Woodbury judgment, the city showed that he knew of the suit and the approaching trial, and that it had requested him to aid in procuring evidence. It did not expressly notify him to defend the suit, "and never notified him that the city would look to him for indemnity." 2 Black, 422, 17 L. Ed. 418. The Supreme Court, in reversing a judgment below in favor of Robbins, held that an express notice to defend was not necessary in order to charge his liability. It was said:

> "He knew that the case was in court, was told of the day of trial, was applied to to assist in procuring testimony, and wrote to a witness, and is as much chargeable with notice as if he had been directly told that he could contest Woodbury's right to recover, and that the city would look to him for indemnity."

Robbins was held not estopped from showing he was under no obligation to keep the street in a safe condition and that the accident was not his fault, but that he was estopped from disputing the particular physical cause of the accident and the amount of the resulting damage or loss to the city, if he knew the suit was pending and could have defended. When the case went back for a retrial the jury were instructed:

> "If it was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered against the city, if he knew that the suit was pending and could have defended it. It is not necessary that the city should have given him an express notice to defend the suit, nor is it necessary that the city should have notified him that it would look to him for indemnity." 4 Wall. 661, 662, 18 L. Ed. 427.

At this trial the city recovered from Robbins and the judgment was affirmed. The Supreme Court expressly approved the instructions above quoted. It also said (4 Wall. 674, 18 L. Ed. 427):

"Knowledge of the pendency of the suit in the most authentic form was brought home to him, *and the legal presumption is that he knew he was answerable over to the corporation*, and, if so, it must also be presumed that he knew he had a right to defend the suit."

We have italicized a part of the above excerpt for its especial relevance to the case at bar. Blodgett was not required to notify the executrix or to plead against her in the Quaschneck suit that the estate would be bound to indemnify him if they lost. The legal presumption is that she knew it, and she should have conducted herself accordingly. The case of Chicago v. Robbins was founded on tort, but it is well settled that the principle applies as well to cases where the duty to indemnify or hold harmless arises from contract. In Burley v. Compagnie de Navigation Francaise, 115 C. C. A. 199, 194 Fed. 335, the court said that—

"When a person is responsible to another, by operation of law or by express contract, and he is fully informed of the claim and that the action is pending, and has full opportunity to defend or participate in the defense, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not."

See, also, Wolfe v. Barataria Land Co., 166 C. C. A. 579, 255 Fed. 503, in which the doctrine was recently applied by this court.

As already observed, in most of the cases the warrantor or indemnitor was not a record party to the prior suit, but had notice and opportunity. A fortiori should he be bound when, like the executrix here, he was a party and participated in the trial.

The executrix prevailed in the Quaschneck suit and recovered her costs, but that was because, the mortgage having been assigned to Blodgett, she claimed no lien for the estate. She did not prevail against Blodgett, to whom the estate was obligated. The liability of the estate to Blodgett was not in issue in that case, and was not decided. That liability involved other matters besides the invalidity of the mortgage. It is another and different cause of action than that involved in the Quaschneck suit. The decree in her favor against Quaschneck was therefore not conclusive against Blodgett in the case at bar.

"The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in Cromwell v. County of Sac, 94 U. S. 351 [24 L. Ed. 195]. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." Keokuk & Western Railroad v. Missouri, 152 U. S. 301, 315, 14 Sup. Ct. 592, 597 (38 L. Ed. 450).

It is of no avail to the executrix that she conducted herself as a nominal defendant in the Quaschneck suit and as indifferent to the outcome. She knew all the facts and circumstances of the transaction between her testator and Blodgett, and was charged with knowledge of their effect as matter of law. She also knew that an important factor was the validity or invalidity of the mortgage as a

lien, and that the question was then at issue with Quaschneck their common adversary. Being a party to the suit, her duty was to stand with Blodgett and maintain that the mortgage was a lien as her testator had warranted. Upon that issue Blodgett lost, and she lost as well.

The judgment is affirmed.

(256 Fed. 748)

HALL v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1919.)

No. 1683.

1. CRIMINAL LAW ⟹369(1)—VIOLATION OF ESPIONAGE ACT—EVIDENCE—OTHER OFFENSES.

On trial of a defendant for violation of the Espionage Act (Comp. St. 1918, §§ 10212a–10212h), by making false reports and doing other acts with intent to interfere with the prosecution of the war, it was prejudicial error to admit evidence of threats made by him against the President, not connected with the acts with which he was charged.

2. CRIMINAL LAW ⟹721½(1)—TRIAL—ARGUMENT OF COUNSEL.

Argument by a district attorney to the jury, based upon his statement that no friend of defendant or citizen had appeared to testify in his behalf, or objected to his prosecution, evidence of which, if offered, would have been incompetent, *held* improper.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge.

Criminal prosecution by the United States against J. K. Hall. Judgment of conviction, and defendant brings error. Reversed.

A. H. Dagnall, of Anderson, S. C., for plaintiff in error.

J. William Thurmond, U. S. Atty., of Edgefield, S. C. (C. G. Wyche, Asst. U. S. Atty., of Greenville, S. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff in error (defendant below) was tried in the United States District Court for the Western District of South Carolina on an indictment containing five counts.

In the first count it is charged that the defendant did "unlawfully, willfully, and feloniously make and convey certain false reports and false statements * * * with intent to interfere with the operation and success of the military and naval forces of the United States. * * *"

The second count charged a violation of Act June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 217 (Comp. St. 1918, § 10212c); it being alleged that defendant "did unlawfully, willfully, knowingly, and feloniously attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States. * * *"

The third count charged a violation of the same act, viz. That defendant "did unlawfully, knowingly, and feloniously obstruct the re-

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

cruiting and enlistment service of the United States, to the injury of the United States. * * *"

In the fourth count a violation of Act May 16, 1918, c. 75, § 1 (Comp. St. 1918, § 10212c), is charged, to wit, that defendant "did unlawfully, willfully, and feloniously make and convey false reports and false statements, with attempt to obstruct the sale by the United States of bonds of the United States. * * *"

In the fifth count it is charged that the defendant violated Act Feb. 14, 1917, c. 64, 39 Stat. 919 (Comp. St. 1918, § 10200a), in that he "did willfully, unlawfully, and feloniously make a certain threat to inflict bodily harm upon the President of the United States. * * *"

Counsel for the defendant demurred to the indictment and moved to quash the same upon the following grounds:

"Because the indictment contained five counts which were improperly joined, the five counts alleging different offenses, not connected in time, and not being of the same class of offenses, and for the additional reason that the defendant is alleged to have violated counts 1, 2, and 3 on the 15th day of May, 1918, which said counts are based on Act June 15, 1917, known as the 'Espionage Law,' which had not been enacted by Congress, and therefore the defendant would be on trial for having committed an offense prior to the passage of the act creating the offense, as testimony admitted tending to prove one count would be considered by the jury on the other counts, thus in effect trying the defendant for an act which was afterwards made a crime by Congress, but which was not a crime at the time."

While the court overruled the demurrer and the motion to quash, nevertheless it held that there was an improper joinder of the fifth count, and accordingly the fifth count was eliminated.

[1] The second assignment of error is in the following language:

"That the court erred in permitting and allowing witness Floyd, over the objection of the defendant, to testify that he had heard the defendant make threats against the President of the United States and that he had heard the defendant say he would like to get an opportunity of putting a bullet through Woodrow Wilson's heart, this threat not being connected in any way with the offense for which the defendant was being tried, and was incompetent, irrelevant, and highly prejudicial."

The third assignment of error is in practically the same language as the second, with the exception that it relates to the testimony of Metta Batson, in which she was permitted to testify, over the objection of counsel for defendant, that she, too, had heard defendant make threats against the President of the United States, saying, among other things, he would like to shoot the President. The evidence of these witnesses was objected to upon the ground that it tended to prejudice the minds of the jurors against the defendant. Counsel insisted, further, that it did not tend to prove any of the offenses for which defendant was being tried, and that any proof that the defendant had committed other offenses was not only "incompetent, but highly prejudicial."

As we have stated, the fifth count of the indictment, which, among other things, charged that the defendant had threatened to inflict bodily harm on the President of the United States, was eliminated. Therefore any evidence tending to show that the defendant had made threats against the President unconnected with the offenses of which

he was convicted became wholly immaterial to the issues then being tried, and could only create the impression that, in addition to the other offenses charged, defendant was disloyal to the government and he had so far forgotten the rules of propriety as to attack the President. The introduction of this evidence would, of necessity, tend to create a false impression upon the minds of the jury, who would unconsciously reach the conclusion that one guilty of making such an unjustified attack upon the President must naturally be guilty of offenses wherein he was charged with being unmindful of the duty that he owed his country. The Circuit Court of Appeals for the First Circuit in the case of Thompson v. United States, 144 Fed. 16, 75 C. C. A. 174, said:

"There is no occasion to question the general rule which excludes all evidence of collateral offenses. Such rule is often called the 'Rule of Logic,' because it is based upon the idea that evidence of the commission of one crime in and of itself has no legitimate tendency to prove the commission of another crime. This general rule in practice is, of course, more absolute when the offenses are of a different nature."

In the case of People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, the court said:

"This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt."

If this were not the rule, there would be no guaranty for the life or liberty of the individual, and this would be especially true in time of war, as in this instance, when the government is involved, or on other occasions when public sentiment might be aroused as to a particular question.

During the war with Germany the people of South Carolina, in common with the people of all other states, were intensely loyal and enthusiastic supporters of the President, who was not only the President of all the people, but also the Commander in Chief of our armies. This spirit was highly commendable. However, where one is charged with an offense even remotely involving his loyalty to the government, the slightest imprudent reference he might make as respects the President or any of the officials of the government would naturally be resented by the people, and the introduction of evidence tending to show that the accused had threatened to kill the President or had spoken of him in a disrespectful manner would be highly prejudicial, and the jurors, as we have stated, would unconsciously be more or less affected thereby in determining the guilt or innocence of the accused.

[2] The fourth assignment of error is as follows, that the court erred in allowing and permitting the United States attorney to say:

"Gentlemen of the jury, is it not a significant fact that defendant has failed to introduce a single witness in his behalf who has ever heard him make a patriotic utterance? Not a single friend or citizen has come here to

testify in his behalf. No man has interceded with the office of the United States attorney in his behalf. Could a man be innocent and be put on his trial without numerous friends and citizens protesting against it?"

It is insisted by counsel for defendant that the language of the district attorney was highly improper, placing as it did an unwarranted burden upon the defendant. In order to relieve the defendant from such burden his counsel requested the court to charge the jury as follows:

"Even if the defendant had offered testimony of patriotic utterances made by him to different persons that said testimony would have been incompetent and inadmissible, and the fact that the defendant had offered no such testimony, must not be taken into consideration by the jury."

The court refused to grant this request. The address of the district attorney to the jury above quoted was manifestly improper for the following reasons:

(a) If it had been offered as evidence, it would have been incompetent. Therefore it was error to permit the district attorney to base his argument upon a false premise, thereby imposing upon the defendant a burden not imposed upon him by law.

(b) The statement that no one had interceded with the office of the district attorney in his (the defendant's) behalf was improper, inasmuch as evidence tending to establish this fact would have been irrelevant and incompetent, if it had been introduced by the government. The fact that he had "been put upon his trial without numerous friends and citizens protesting against it" was wholly immaterial as to the issue then being tried, and if there had been an attempt on the part of the government to establish such alleged fact, no doubt the court below would have sustained the objection to the introduction of such testimony upon the grounds we have stated. Indeed, it is not the custom for citizens to protest against the prosecution of any one who has been indicted by a grand jury and placed upon his trial, even though there should be a general impression in the community that he is innocent. Such proceeding would be highly improper and at variance with the orderly procedure in the trial of cases. In other words, if this policy should ever prevail, it would be tantamount to substituting the judgment of the populace for that of the court and jury. We deem it proper to say, in passing, that a proceeding of this character at a time when we have just emerged from a contest wherein we sought to destroy autocracy and accomplish the freedom of mankind would be inconsistent to say the least.

At the conclusion of the court's charge counsel for the defendant again called attention to what he alleged to be improper argument, and requested the court to say to the jury that such charge was improper, and should not be considered as bearing upon the guilt or innocence of the defendant.

The record does not purport to give the exact language of the court in refusing to charge the jury as requested; however, counsel asserts in his brief that the court said:

"The defendant is being tried only on the testimony which has been introduced in evidence."

This language is not sufficiently broad to negative the statement made by the district attorney.

Where one is charged with a crime, he is presumed to be innocent until the contrary is shown by legal evidence sufficient to satisfy the jury of his guilt beyond a reasonable doubt; and this rule applies to the degraded and debased, as well as to those who possess a good character. The following statement in 12 Cyc. p. 384, is very much in point:

"The accused, however degraded or debased he may be, is presumed to be innocent of the particular offense charged until he is pronounced guilty on evidence which convinces the jury of his guilt beyond a reasonable doubt. The presumption of innocence accompanies the accused until verdict, and does not cease when the case is submitted to the jury."

The following cases sustain this rule: Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481.

In the case of Lowdon et al. v. United States, 149 Fed. 673, 79 C. C. A. 361, the court said:

"Where accused offered no evidence to prove his good character, and was therefore entitled to rely on a legal presumption that his character was good, it was prejudicial to accused for the prosecuting attorney, in making a strong appeal to the jury, to assume that defendant's character was bad because of his failure to prove the contrary; defendant's objection thereto having been overruled, and the district attorney not having withdrawn the argument."

In 2 Ruling Case Law, under title "Argument of Counsel" (page 420, § 17), it is stated:

"Counsel should never in the course of argument state facts that are based on his own personal knowledge only. If he desires to get such facts before the jury, he should take the stand and present them in a legitimate manner; for although, in the heat of argument, fervor and partisanship are to be expected from counsel, this cannot justify a departure from the field of argument and discussion of the facts disclosed by the evidence into the field of testimony to establish other facts."

In a time like this, when patriotism is at a high pitch and many people have to a certain extent lost their mental poise, courts and jurors should be extremely cautious when required to pass upon the rights of an individual charged with an offense affecting the welfare of the government.

In view of what we have said, we do not deem it necessary to discuss the other assignments of error. It follows that the court below should be reversed, and a new trial granted.

Reversed.

(256 Fed. 753)

WEST HELENA CONSOL. CO. v. McCRAY.*

McCRAY v. WEST HELENA CONSOL. CO.

(Circuit Court of Appeals, Eighth Circuit. March 12, 1919.)

Nos. 5203, 5211.

1. APPEAL AND ERROR ⟹1039(8)—HARMLESS ERROR—RULINGS ON PLEADINGS —MOTION TO MAKE DEFINITE.

Error in denying the motion to make the allegations of negligence in the complaint more definite does not require reversal, where there was no claim that the defendant was surprised at the trial, or unprepared to meet the plaintiff's case, and depositions had been taken, which indicated the acts of negligence relied on.

2. STREET RAILROADS ⟹114(9)—COLLISION WITH AUTOMOBILE—EVIDENCE—NEGLIGENCE OF MOTORMAN.

Evidence *held* not to warrant a finding that motorman was negligent; it appearing that he had his car under full control when an automobile, which had been running parallel to the car tracks, without warning turned across them in front of the car and was struck.

3. STREET RAILROADS ⟹90(5)—COLLISION WITH AUTOMOBILE—NEGLIGENCE.

Where automobile attempted to cross street car tracks when car was so near that, though motorman had it under control, he could not stop in time to prevent collision, street car company was not negligent.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by Lora McCray against the West Helena Consolidated Company. Judgment for plaintiff, and defendant brings error, and plaintiff also brings error, from the order refusing a new trial, if plaintiff should remit $4,000 from the verdict. Judgment reversed, and new trial ordered, and plaintiff's writ of error dismissed.

W. E. Hemingway, of Little Rock, Ark. (Edwin Bevens and Leo J. Mundt, both of Helena, Ark., and G. B. Rose, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., on the brief), for plaintiff in error.

C. P. Harnwell, of Little Rock, Ark., for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. The defendant in error, hereinafter called plaintiff, sued the railway company and one Prewett to recover damages for personal injuries alleged to have been caused by their negligence. The cause of action arose out of a collision between a car of the railway company and an automobile owned and driven by Prewett at the intersection of Porter and Franklin streets in the city of Helena, Ark. The plaintiff, in stating her only ground of negligence, alleged that the collision would not have occurred, had it not been for the gross negligence of Prewett and the railway company in operating the car and automobile.

The railway company filed a motion for an order requiring the plaintiff to make her complaint more definite and certain, by stating

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 250 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

in what respect the car was negligently operated. This motion was denied, and such ruling is assigned as error. The exercise of a sound discretion would, we think, have required that the motion be granted. Kirby's Dig. §§ 6091, 6147; Little Rock Ry., etc., v. Smith, 66 Ark. 278, 50 S. W. 502; Chicago Ry. v. Smith, 94 Ark. 524, 127 S. W. 715; New York, etc., v. Kistler, 66 Ohio St. 326, 64 N. E. 130.

[1] The plaintiff charged generally that the railway company was negligent in the operation of its car. It was in fairness entitled to know in what respect the car was negligently operated. We are led to believe, however, from an examination of the record, that the railway company was not prejudiced by the denial of its motion. There is no claim or showing that the railway company was surprised at the trial or unprepared to meet the case of the plaintiff. Moreover, it appears that certain depositions had been taken bv the plaintiff in the case before the motion was made, and the defendant railway company undoubtedly knew substantially what the claim of the plaintiff was. We therefore refuse to reverse for the error in denying the motion, but deem it proper to say that we may not always be able to act in a similar way in other cases. The motion, if renewed, should be granted.

[2] After issue joined, the case was tried and a verdict returned for the plaintiff against the railway company and in favor of Prewett against the plaintiff. Judgment having been entered upon the verdict, the railway company brings the case here, assigning error. At the close of the evidence the railway company moved the court for a directed verdict in its favor. The motion was denied, and this ruling is assigned as error. The evidence shows substantially the following facts:

Porter street, above mentioned, runs in an east and west direction; Franklin street runs north and south, and intersects Porter street; on the morning of November 13, 1915, at about 7:20 o'clock a. m., the plaintiff was at the house of Mrs. Summers, which is located on the north side of Porter street about 43 feet east of the east line of Franklin street, where it intersects Porter street, and about 75 feet from the center of Franklin street; the railway company's street car line extends along Porter street in front of the house mentioned, and crosses Franklin street at the above-mentioned intersection.

On the morning in question the plaintiff and two other ladies, Miss Venable and Miss Kerr, being desirous of going to the Iron Mountain depot, for the purpose of taking a train for Little Rock, procured the service of Prewett to take them to the depot in an automobile. The automobile reported at the house with the front thereof facing west. The plaintiff seated herself on the back seat of the automobile, on the left side thereof. The other two ladies above mentioned occupied the remainder of the seat to the right. This situation placed the plaintiff next to the street car track. Porter street was of sufficient width to allow the street car and automobile to move along the same together in safety.

Without delay, after the above-named passengers were seated, the automobile was driven west by Prewett. He testified that he drove to

the west side of the intersection of Porter and Franklin streets and turned south across the track of the railway company, and that, as he got very nearly off the street car track, a street car of the railway company going west struck the automobile on the rear fender, on the east side, right over the axle of the rear wheel. The evidence shows that at this collision the plaintiff, being seated as stated, was struck by the car and seriously injured. Prewett further testified that, after the collision, he turned the automobile to the north and subsequently drove it to the stable; that the car was not injured, except the fender was bent; that none of the occupants of the automobile were injured, except the plaintiff; that the automobile was not overthrown, but simply skidded around; that he did not stop, look, or listen for a car, before he started to cross the track, nor did he put his hand out or give any signal that he was about to do so.

All the occupants of the automobile, including Prewett, testified that they saw no street car approaching from the east when they got into the automobile, and saw no street car until the automobile was struck. The undisputed evidence shows that there was an unobstructed clear view from the Summers house, east on Porter street, for three squares, from which direction the street car came. The plaintiff and Miss Venable testified that the curtains on the automobile were up, Miss Kerr that they were on, and the motorman said that they were up—closed. The occupants of the automobile also testified that they heard no gong sounded by the motorman on the street car prior to the accident.

Miss Coward, a witness for the plaintiff, testified that on the morning in question she said good-bye to the girls as they were getting into the automobile, and then proceeded to cross Porter street to the south; that when she had gotten probably 40 feet from the curb where the automobile was standing, she hard the crash of the collision; that she did not see the collision, as her back was turned to the automobile and the street car. She also testified that the motorman did not ring his gong, that she did not notice the street car when it passed her, and did not know that it had passed until she heard the crash of the collision; then she thought how narrowly it had missed her.

Mr. Kelley, a witness for defendant, was a passenger on the street car that collided with the automobile. He testified that there was a trailer attached to the car in which he was seated, that he first saw the automobile about 20 feet before it was struck, traveling directly west, sort of in a circle like, as if it were making a swing in front of the street car crossing the track; that the automobile was not more than 6 or 8 feet from the car when it started across the track; that the motorman was ringing his gong three-fourths of the way across the block.

Mrs. Grace Peacor, a witness for the defendant, testified that she was standing a block west of the intersection of Porter and Franklin, on Porter street, when the collision occurred, and saw it. She was waiting for the street car. She first saw the street car about a block east of the intersection. She heard the gong ring, and supposed it was for a woman who was crossing the street, and who seemed to take no

notice of the car; that the automobile was going at a fair speed, and when it got to the west side of the intersection, it turned rather abruptly, and it looked like it would be a narrow escape. The turn of the automobile was made rather quickly.

The motorman testified that, when he first saw the automobile, it was standing in front of the house of Mrs. Summers. The street car at that time was a block away or more. At this time he saw a lady crossing Porter street. He rang the bell for her, and saw the passengers getting into the automobile. They started up just before he got even with them. When he noticed the car start up, he continued to ring the gong until the automobile cut short across the street. The automobile gave no signal or sign of any kind that it was about to cross the track. When the automobile turned across the track, he reversed the motor and applied the emergency brakes. The rails were slick, and the reverse did not have any effect on it much. The street car and possibly the trailer cleared Franklin street before coming to a full stop. Other testimony showed that it had rained during the previous night, and there was a light rain falling on the morning in question. The motorman further testified that the automobile and street car could travel together upon Porter street in safety; that the automobile was small, and before it started to cross the track was in a place of safety; that he tried his best to stop his car after he saw the automobile start to cross the track.

The facts being as stated, was there substantial evidence to support a verdict against the railway company, based upon negligence in operating the car? So far as the speed of the car is concerned, all the witnesses, except Miss Coward, that testified upon the subject, either testified that the car was moving at a rate of 8 or 9 miles per hour, or that it was moving at ordinary speed. It is urged that the fact that the car and the trailer cleared Franklin Street after the collision indicated excessive speed. We do not think so, as Franklin street, according to the evidence, was 64 feet in width and the collision occurred on the west side thereof, and upon this point we must take into consideration that the automobile was not overturned or injured, except that the fender was bent.

The witness Coward was asked the following question:

"Do you know at what rate of speed the street car was going?"

Answer:

"I don't know the rate, but it must have been running very fast in order to have struck the taxicab 40 or 50 feet east of me after passing me."

This testimony has no probative value, because it was a mere guess, based upon an assumption that was not true in fact. Moreover, she did not know that the car had passed her, as she testified, until she heard the crash of the collision. There is in our judgment no conflict in the evidence as to the speed of the car, and the evidence is to the effect that it was either ordinary speed or 8 or 9 miles an hour; in fact, the trial court so stated in the presence of the jury.

As to the ringing of the gong, no witness testified that it was not rung, except Miss Coward, who, as before stated, did not even know

that the car had passed her. There was abundant testimony that the gong was rung. The occupants of the car say they did not hear the gong, but they also say that they did not hear or see the car, although it must be taken as true, by reason of the physical facts, that the car was traveling almost right beside the automobile. This is not a case where an automobile was proceeding on Franklin street, at right angles with the car, but it is where an automobile was traveling on Porter street, in the same direction as the street car, and they were so near together that a small Ford automobile could not turn and cross the track without being hit by the street car. Such being the physical facts, we doubt very much whether the ringing of the gong would have changed the situation.

[3] The trial court charged the jury as follows:

"Seeing a man in a vehicle about to cross the tracks or driving along the tracks, the motorman may assume that he will turn aside out of the way of the cars, or not attempt to cross in front of them, when the car is so near as to indicate the danger of a collision. * * *

"Now, gentlemen of the jury, it is for you to determine, first, could the accident have been prevented if the street car motorman had exercised ordinary diligence, as I explained to you the law requires? If he could, and didn't do it, then, gentlemen of the jury, the street car company is liable, and your verdict should be against it.

"If, on the other hand, this automobile attempted to cross the tracks, and got on there, when the car was so near that, although he had it under control, he could not stop it in time to prevent the collision, then, gentlemen of the jury, the company was not guilty of any negligence, and it is not liable, and your verdict should be for the street railway company."

Of course, the assumption that the motorman may indulge in, as above stated, does not give him the right to proceed without using ordinary care with reference to the conditions that surround him. He should have his car under such control that he may use all the appliances at hand to stop his car, if he discovers that his assumption is wrong; but this requirement of having his car under control and using ordinary care to insure the safety of the vehicle does not require the motorman to insure the safety of the vehicle in any event, for that requirement would destroy the assumption in which he has a right to indulge, and require him to stop his car and wait until he was certain what the vehicle would do. The court stated the law correctly, as we understand it, in the excerpt from its charge last above quoted. The only testimony as to what the motorman did, after he discovered the automobile was about to cross the track, is the testimony of the motorman himself, and that testimony, in our opinion, would not support a verdict against the railway company.

Briefly stated the case is this: The street car and the automobile were traveling in the same direction on Porter street, so near together that the automobile could not cross the street car track in front of the car without being struck. The automobile abruptly or suddenly, without any warning, turns to cross the track in front of the car, and when the motorman saw what the driver of the automobile was about to do, he, so far as the evidence shows, did all that he could to stop his car. This, in our judgment, does not show negligence in the operation of the car.

In our opinion, the motion for a directed verdict in favor of the defendant railway company ought to have been granted and for the error in not so ruling the judgment below must be reversed, and a new trial ordered. Other errors are assigned which we do not find it necessary to consider.

The writ of error sued out by the plaintiff (case No. 5211) from the order refusing to grant a new trial, if the plaintiff should remit the sum of $4,000 from the verdict, is dismissed.

(256 Fed. 758)

In re PERPALL.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 115.

1. SALES ⚷218½—CASH SALE—EVIDENCE.
   Evidence that the seller's messenger delivered a bond to a broker, and that another messenger called for the purchase price within a few hours after giving the broker time to make the check according to the usual business custom, *held* to sustain a finding that title did not pass until payment.
2. SALES ⚷202(8)—CASH SALE—WAIVING PAYMENT.
   An apparently unrestricted delivery of goods sold for cash presumably waives the condition that payment is necessary to pass title.
3. SALES ⚷218½—JURY QUESTION—WAIVING PAYMENT.
   Whether the condition that payment is required to pass title to goods sold has been waived is a jury question, especially where the rights of third parties have not intervened.
4. SALES ⚷202(8)—PASSING TITLE—WAIVING PAYMENT.
   The seller of a bond did not waive payment as a condition precedent to passing title, where his messenger delivered the bond to a broker and another messenger, according to the usual business custom, called to receive payment a few hours later, after allowing time for the broker to make entries, execute a check, etc.
5. PAYMENT ⚷22—PAYMENT BY CHECK—RETAKING GOODS.
   Accepting a buyer's check does not ordinarily operate as payment, so as to prevent the seller from retaking the goods, if the check is not paid.

Petition to Revise Order of and Appeal from the District Court of the United States for the Southern District of New York.

Petition by Louis R. Hammerslough for reclamation of certain property from Ezra P. Prentice, as receiver in bankruptcy of Clarence C. Perpall. Order for claimant, and said receiver brings a petition to revise and also appeals. Affirmed.

The claimant, Louis R. Hammerslough, brought his petition for the reclamation from the receiver of Clarence C. Perpall, doing business under the name of Clarence C. Perpall & Co., bankrupt, of one first-mortgage 30-year Seattle-Everett 5 per cent. gold bond, due 1939, of the par value of $1,000, and numbered 1324.

The referee in bankruptcy reported that the claimant was entitled to the bond in controversy, and this report was confirmed by the District Court, which made an appropriate order directing that the claimant recover the said bond with the attached coupons. From the order so made the receiver in bankruptcy brought his petition to revise and also his appeal. The two proceedings have been consolidated in this court.

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Prior to his failure the bankrupt was a member of the Consolidated Stock Exchange, while the claimant, who was a dealer in securities, carried on his transactions through the firm of E. Bunge & Co. Upon Saturday, June 29, 1918, the bankrupt had a conversation over the telephone with the claimant, the result of which was that the claimant agreed to sell and the bankrupt agreed to buy the bond in question at the price of 75¼ per cent. plus accrued interest, the transaction to be closed upon the following Monday, July 1st.

In the afternoon of that day the cashier of E. Bunge & Co. gave the bond, together with a memorandum of sale from E. Bunge & Co. to the bankrupt, to one of the Bunge firm's messenger boys. The boy carried the bond, with the memorandum attached, to the office of the bankrupt, where it was delivered to the cashier; the boy continuing on his way for the purpose of making other deliveries of securities. It appears to be the practice in the financial district for deliveries to be made in this manner; the boy again calling at the offices at which he has made deliveries for the purpose of receiving checks in payment for the securities previously delivered. This practice is followed, to the end that business may be expedited, and to permit the firms receiving securities to make comparisons, appropriate book entries, and draw the checks. Accordingly a messenger from E. Bunge & Co. again called at the cashier's window of the bankrupt and received a check drawn by the bankrupt upon the Continental Bank and in favor of E. Bunge & Co. in the sum of $769.17, the purchase price of the bond plus accrued interest. This check was taken to the office of E. Bunge & Co., and that firm immediately deposited the same to its credit in the Continental Bank. At 2:40 p. m. of July 1, 1918, the suspension of the bankrupt was announced from the rostrum of the Consolidated Stock Exchange. Upon learning of this announcement, E. Bunge & Co. demanded of the Continental Bank the payment of the check or its certification. Neither of the demands was met, and the check was returned by the bank to E. Bunge & Co.

The testimony before the referee established that the Bunge check was the last check drawn and delivered by the Perpall concern prior to its suspension, and the testimony also established that when the check was drawn and delivered the account of Perpall was largely overdrawn. Following the suspension above referred to, an involuntary petition in bankruptcy was filed against Clarence C. Perpall, doing business under the name of Clarence C. Perpall & Co. An adjudication followed in due course, and in the meanwhile Ezra P. Prentice was appointed and qualified as the receiver of the bankrupt, and as such came into the possession of the bond in question as a part of the bankrupt's assets.

Rosenberg & Ball, of New York City (David W. Kahn, of New York City, of counsel), for appellant.

Samuel Fleischman, of New York City, for respondent.

Before ROGERS and MANTON, Circuit Judges, and KNOX, District Judge.

KNOX, District Judge (after stating the facts as above). In the case of Empire State Type Founding Co. v. Grant, 114 N. Y. 40, 21 N. E. 40, it was held that, where a contract for the sale of personal property does not provide, in express terms, that payment shall be made on delivery, or that payment and delivery shall not be concurrent, the intent of the parties must control, and if from the acts of the parties and the surrounding circumstances it can be inferred that it was intended that payment and delivery should be concurrent acts, the title will be deemed to have remained in the vendor until the condition of payment is complied with. The court in that case also concluded that the question of intent in such case is one of fact.

[1] Upon the facts now under consideration, the referee, before

whom the testimony was taken, has found that the sale of the bond in question was for cash or the equivalent of cash upon delivery; in other words, it has been resolved as a question of fact that before title to the bond should pass to the bankrupt there was the necessity of the performance by him of the condition precedent of payment. We believe this finding of the referee to be entirely justified by the evidence.

[2, 3] It therefore remains to be determined if the delivery of the bond to the cashier of the bankrupt in the manner shown by our recital of the facts constituted a waiver upon the part of the claimant of the condition of payment. Unquestionably it lay within the power of the vendor to waive any condition imposed by him in his original contract, and we also realize that an apparently unrestricted and unconditional delivery of goods sold for cash is presumptive evidence of the waiver of the condition that payment should be made on delivery in order to vest the title in the purchaser. Scudder v. Bradbury, 106 Mass. 422; Hammett v. Linneman, 48 N. Y. 399; Smith v. Lynes, 5 N. Y. 41. Nevertheless, whether or not there has been a waiver of the condition is a question for the jury, and this is particularly true when the rights of third persons have not intervened. Mechem on Sales, § 549, and cases referred to in footnote.

[4] The transaction in the case at bar was along lines and in accord with practices well known and understood in the financial district of this community. As has been shown, the bankrupt was a member of the Consolidated Stock Exchange, while the claimant was formerly a member of the New York Stock Exchange, and his agents, E. Bunge & Co., were what are known as "outside brokers"; that is, dealers in securities not listed upon the local stock exchange. It would seem to follow, at least in the absence of any proof to the contrary, that the sale of the Seattle-Everett bond was made subject to the customs and practices obtaining among dealers in securities within the financial district. Now, what happened here was this: The sale of the bond was made upon Saturday, June 29th, and the sale under the custom "carried" until Monday, July 1st; that is to say, the bond was deliverable upon Monday for cash or its equivalent, and upon Monday E. Bunge & Co., through one of their messengers, did deliver the bond to the cashier of the bankrupt. Before drawing a check for the purchase price of the bond, it was necessary for the cashier to make his comparisons and his blotter entries, whereupon he would draw the check and deliver the same to Bunge & Co.'s messenger. Instead of waiting in the office of the bankrupt for these details to be attended to, the messenger occupied the time in making other deliveries, and later another messenger of the Bunge firm called to pick up the check which, when he reached the bankrupt's office, was awaiting him.

In view of the finding of the referee as to terms of sale, we believe that the facts incident to the delivery of the bond fall short of constituting a waiver of the condition of payment. From the circumstances here present, no intent or purpose to extend credit to the bankrupt arises. The claimant is in no worse position than he would have been in, had the messenger idled away his time in the office of the bankrupt while waiting for the details of making the entries and drawing

the check to be completed. Had he remained there, he would have been entitled to receive a check that would be the equivalent of cash, and that was what he was entitled to receive when, in the regular course of business, he or his substitute returned to the bankrupt's office. As is said by Mr. Mechem, at section 551 of his work on Sales:

"There is always an implied understanding that the vendee is acting honestly and that he takes the goods subject to the contract. It is not necessary, therefore, that the vendor shall in express terms declare that he makes the delivery conditional; it is sufficient if the intent of the parties that the delivery is conditional can be inferred from their acts and the circumstances of the case."

The above conclusions, as applicable to the facts before us, we consider to be supported by Empire State Type Founding Co. v. Grant, 114 N. Y. 40, 43, 21 N. E. 40; Sprague Canning Machinery Co. v. Fuller, 158 Fed. 588, 86 C. C. A. 46, 20 Am. Bankr. Rep. 157; In re Pittsburgh Industrial Iron Works (D. C.) 179 Fed. 151, 25 Am. Bankr. Rep. 221, 225. The referee has found upon entirely satisfactory evidence that there was no waiver here.

[5] It has previously been said that when the bankrupt drew his check for the purchase price of the bond his account was largely overdrawn, and the bank dishonored the check upon a demand for its certification or payment. The claimant, therefore, never received that which, as a condition precedent to the passing of title to the bond, the bankrupt had agreed to give him; and taking a check of the buyer does not ordinarily operate as payment, to prevent the seller from retaking the goods if the check is not paid. Nat. Bank v. Railroad Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566. So as to the buyer's note. Davison v. Davis, 125 U. S. 90, 8 Sup. Ct. 825, 31 L. Ed. 635. Where such prepayment is the express condition of the sale, there is no doubt that the vendor could retake the goods from the vendee, if the condition is not performed. Barrett v. Pritchard, 2 Pick. (Mass.) 512, 13 Am. Dec. 449.

The order appealed from is affirmed.

(256 Fed. 761)

HUBBARD BROS. & CO. et al. v. SOUTHERN PAC. CO. et al.

SOUTHERN PAC. CO. v. LIQUIDATORS OF OUACHITA NAT. BANK et al.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1919.)

No. 3283.

1. CARRIERS ⟹94(4)—CONVERSION BY CARRIER—DAMAGES—INTEREST.

In an action against a railroad for conversion of cotton, in that the railroad delivered the cotton on a forged bill of lading, interest should be allowed the plaintiff only from judicial demand, and not from date of delivery of the cotton on the forged bill of lading; the conversion not being willful.

2. CARRIERS ⟹57—CONVERSION BY CARRIER—DAMAGES—ASSIGNEE OF BILL OF LADING.

Where a railroad converted a shipment of cotton by delivering it on a forged bill of lading, a bank holding the true bill of lading as collateral

may recover from the railroad the entire value of the cotton, with interest.

3. CARRIERS ⟹58—ASSIGNMENT OF BILL OF LADING—DELIVERY ON SHIPPER'S FORGED BILL OF LADING—RIGHTS OF BUYER.

Where a cotton dealer sold cotton and drew on the buyer, placing the true bills of lading as collateral with a bank, and sending to the purchaser a forged bill of lading, which the latter presented, obtaining the cotton, the buyer should be considered an equitable assignee of the seller and is entitled, on recovery by bank of judgment against the railroad for conversion, to any balance after payment of secured debt.

4. BILLS AND NOTES ⟹434—SIGNATURES—NOTICE OF GENUINENESS.

Ordinarily the drawee of a bill of exchange must determine at his peril the genuineness of the signature of the drawer, and, if the ostensible maker of a forged note pays the note, he cannot recover the amount.

5. CARRIERS ⟹71—CONNECTING CARRIERS—SURRENDER OF GOODS ON FORGED BILL OF LADING—REMEDIES OF CARRIER.

A common carrier can recover against one who receives goods upon a forged bill of lading purporting to have been issued by an agent of another carrier; the law fixing liability resulting from such a bill of lading not undertaking to make each of the agents of all the lines an agent of all of the connecting lines.

6. CARRIERS ⟹71—CONNECTING CARRIERS—SURRENDER OF SHIPMENT ON FORGED BILL OF LADING—LIABILITY.

The mere fact that a railroad had previously delivered cotton to a buyer on forged bills of lading does not prevent the railroad from recovering from such buyer the value of the cotton delivered on a forged bill of lading purporting to have been issued by a connecting carrier, on the ground that the buyer was misled by the negligence of the railroad.

7. CARRIERS ⟹56—INDORSEMENT OF DRAFT—EFFECT AS TO BILL OF LADING ATTACHED.

The indorsement of an ordinary draft for collection does not make the indorser a guarantor to the drawee of the genuineness of bills of lading attached, nor of the quantity or quality of the commodity shipped.

8. ASSIGNMENTS ⟹50(1)—DRAFT ON PARTICULAR FUND—OPERATION.

Assuming that the mere insertion of the words "against 214 B/C" in the body of a draft could render it a conditional order on a particular fund, such could not be the case where, for a considerable time prior to the transaction, there was a running account between the drawer and the drawee, and at the date of the draft the drawer had a credit with the drawee, and no accounts were kept of particular shipments of cotton, the drawer having established a credit with his cotton business as a basis, and the drawee was reimbursed by and made a profit out of the cotton.

9. CARRIERS ⟹55—DRAFT AND BILL OF LADING—NEGOTIABILITY.

The insertion of the figures and letters "against 214 B/C" in the face of a draft, to which was attached a bill of lading for 214 bales of cotton, did not destroy its characteristics as a negotiable instrument in Louisiana or New York where the Uniform Negotiable Instruments Law was in force, being merely indicative of a particular fund out of which reimbursement was to be made.

Appeals from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit by Hubbard Bros. & Co. and others against the Southern Pacific Company and the Liquidators of the Ouachita National Bank and Monroe National Bank. The liquidators of the Ouachita National Bank and the Southern Pacific Company file cross-bills. From a judgment in favor of the liquidators of the Ouachita National Bank against the Southern Pacific Company, and in favor of the Southern

Pacific Company against plaintiff, the Southern Pacific Company and the plaintiff appeal. Modified and affirmed.

Hughes, Rounds, Schurman & Dwight, of New York City, and Howe, Fenner, Spencer & Cocke, of New Orleans, La. (Charles Payne Fenner, of New Orleans, La., on the brief), for appellants Hubbard Bros. & Co. and others.

George Denegre, Victor Leovy, and Henry H. Chaffe, all of New Orleans, La., for appellant Southern Pac. Co.

Farrar, Goldberg & Dufour, of New Orleans, La., and Hudson, Potts, Bernstein & Sholars, of Monroe, La. (Abraham Goldberg, of New Orleans, La., and Henry Bernstein, of Monroe, La., on the brief), for appellees liquidators of the Ouachita National Bank and others.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. H. L. Bandy, in 1904 and prior thereto, was engaged at Monroe, La., in buying and selling cotton. On August 15, 1904, Bandy discounted at the Monroe National Bank a draft for $9,000, drawn by him on Hubbard Bros. & Co., of New York. The body of the draft was in this form:

"Pay to the order of T. E. Flourney, cashier, nine thousand dollars, value received, and charge the same to account of against 214 B/C."

To the draft were attached, indorsed in blank, documents, afterwards ascertained to be forgeries, in the form of bills of lading for 214 bales of cotton, issued to Bandy by the Vicksburg, Shreveport & Pacific Railway Company, at Monroe, for shipment to New York via issuing company and Southern Pacific Railroad and steamship lines, consigned "to shipper's order, notify Hubbard Bros.," purporting to be signed by W. G. Wallace, then the agent of issuing company at Monroe. The draft was paid upon presentation.

In September Bandy purchased at New Orleans 214 bales of cotton, which, under his instructions, were shipped, via the Southern Pacific Company steamship line, from New Orleans to New York; a bill of lading being issued "to shipper's order, notify Hubbard Bros.," the cotton having the same identifying marks as in the forged bills of lading for 214 bales. To cover the purchase price of the cotton, the seller drew a draft on Bandy, through the Ouachita National Bank, attaching bills of lading covering the 214 bales of cotton. Bandy gave his check on the bank for the amount; the check being charged to him, and the bills of lading being retained as security. The Southern Pacific Company, upon surrender of the forged bills of lading, delivered to Hubbard Bros. & Co., the 214 bales of cotton shipped from New Orleans.

About August 29, 1904, Bandy forwarded to Hubbard Bros. by registered mail, indorsed in blank, another forged bill of lading of the same character as the other forged instruments, for 100 bales of cotton. Bandy wrote Hubbard Bros. & Co. that he would draw against this bill of lading when he arranged for the shipment of other cotton.

On August 31, 1904, Bandy discounted with the Ouachita National Bank a draft upon Hubbard Bros. & Co. for $19,700; the draft being in the ordinary form. To the draft were attached bills of lading, covering 301 bales of cotton. This cotton is not involved in this suit. The draft, however, was for a larger sum than would be covered by the 301 bales, and was drawn, also, with reference to the forged bills of lading for 100 bales hereinbefore mentioned. In October, Bandy purchased in New Orleans 100 bales of cotton, which were shipped, via the Southern Pacific Company, to New York; a bill of lading "to shipper's order, notify Hubbard Bros. & Co.," being issued, the cotton being identified by the same marks as were on the forged instrument forwarded Hubbard Bros. & Co. on August 29th. To cover the price of this 100 bales of cotton shipped to New York, the seller drew a draft on Bandy, and attached thereto the bill of lading for the cotton. Bandy gave his check on the Ouachita Bank for the amount, which was charged to him; the bill of lading being retained as collateral security. On October 25th this 100 bales of cotton was delivered by the Southern Pacific Company to Hubbard Bros. upon surrender of the forged bill of lading for 100 bales.

Hubbard Bros. & Co. instituted in the Western district of Louisiana a suit against the Southern Pacific Company, and the two national banks involved, setting up the facts stated, together with other facts to be referred to, and sought an adjudication of the rights of all parties. The several claims may be thus stated:

(1) The Ouachita National Bank, through its liquidators, asked for a judgment against the Southern Pacific Company for the value of the 314 bales of cotton for which it held bills of lading, with interest from the date of its delivery to Hubbard Bros. & Co.

(2) The Southern Pacific Company sought judgment against Hubbard Bros. & Co. for the value of all of the cotton delivered to them on the forged bills of lading. Hubbard Bros. & Co. denied their liability for the cotton so delivered.

(3) Hubbard Bros. & Co. also claimed that, in the event they were to be held liable to the Southern Pacific Company, they should have a judgment against the Monroe National Bank for the amount of the draft for $9,000 which they paid to that bank, with interest.

Judgment was rendered: In favor of the liquidators of the Ouachita National Bank against the Southern Pacific Company for $17,232.-42, with interest at 5 per cent. from the respective dates of delivery of the cotton to Hubbard Bros. & Co. until paid; and in favor of the Southern Pacific Company against Hubbard Bros. & Co. for the same amount, with like interest; and against Hubbard Bros. & Co. on their claim against the Monroe National Bank.

[1] The judgment of the Ouachita National Bank against the Southern Pacific Company is not attacked, except that it is contended that interest should be from judicial demand, instead of from the date of the delivery of the cotton by the Southern Pacific Company to Hubbard Bros. & Co. That which the Ouachita National Bank is entitled to recover is its damages; and if interest be calculated from the date the cotton was delivered to Hubbard Bros. & Co., it would

be benefited by the conversion. In November, 1904, the bank made demand on the Southern Pacific Company for the cotton. This date, rather than the date of the legal conversion, or the date of judicial demand, would appear to be the proper date for the interest to begin. By adopting this date, the bank will be made whole. While the Southern Pacific Company, in legal contemplation, converted the cotton when it was delivered to Hubbard Bros. & Co., the circumstance that the conversion was not willful makes a difference the law seems to recognize. 38 Cyc. 2101.

[2, 3] The amount which the Southern Pacific Company must pay to the Ouachita Bank is the measure of the liability of Hubbard Bros. & Co. to the Southern Pacific Company. The Ouachita Bank, holding the bills of lading as collateral, may recover the entire value of the cotton, with interest. Hubbard Bros. & Co., as equitable assignee of Bandy, would be entitled to any balance after the payment of the secured debt; but it appears that the debt, with interest, exceeds the recovery.

Hubbard Bros. & Co. contend that, nothwithstanding the cotton was delivered to them on forged bills of lading, the Southern Pacific Company should not recover. Propositions are made: (1) That a concern issuing a bill of lading must be held to know its own signature, and must take the consequences of a mistake; (2) that the prior course of business, by which several shipments of cotton were delivered to Hubbard Bros. & Co. on forged bills of lading, constitutes negligence upon the part of the Southern Pacific Company, estopping them from recovery; (3) that the Southern Pacific Company is estopped by the delay in presenting the claim against Hubbard Bros. & Co.

[4, 5] 1. It is contended that the same rules should be applied to bills of lading as to bills of exchange. Ordinarily the drawee of a bill of exchange must determine at his peril the genuineness of the signature of the drawer. If the ostensible maker of a forged note pays the note, he cannot recover the amount. United States v. Bank of Georgia, 10 Wheat. 333, 6 L. Ed. 334; Gloucester Bank v. Salem Bank, 17 Mass. 33; Cook v. United States, 91 U. S. 389, 23 L. Ed. 237. The reasoning by analogy cannot be made to control, in the face of definite decisions holding that a common carrier can recover against a person who receives goods upon a forged bill of lading. Among the cases may be cited N. Y. Central Railroad v. Bank of Holly Springs, 195 Fed. 456, 115 C. C. A. 358; L. & N. R. R. Co. v. McKay & Morgan, 133 Tenn. 503, 182 S. W. 585. The reasoning to which appellant appeals, based on the suggestion that a corporation is better able to know its signature than any one dealing with it, cannot be made to apply to the bills of lading in question. The forged bills of lading appear on their face to have been issued by an agent of the Vicksburg & Shreveport Railroad Company. Under the law this agent had a right to give a bill of lading binding upon its direct and its mediate connections. To bind a connecting carrier, it is not necessary that the agent of the issuing company should be an agent of the connecting company. The law fixes the liability resulting from

such a bill of lading, but does not undertake to make each of the agents of all of the lines an agent of all of the connecting lines. It is quite impossible for a carrier to be familiar with the signatures of all of the agents of all of the carriers in the United States. Any rule, based upon an assumed ability of the company charged with the responsibility to know a signature better than an individual asserting a claim against it, must be held without merit, when the circumstances negative the possibility of such knowledge.

[6] 2. The evidence discloses that, in addition to the bills of lading for 214 bales of cotton, and the bill of lading for 100 bales of cotton, hereinbefore mentioned, forged bills of lading for some hundreds of other bales had been presented by Hubbard Bros. & Co. to the Southern Pacific Company, and cotton delivered on them. It appears, also, that genuine bills of lading were, as to all of this cotton, issued by the Southern Pacific Company or a connecting line, but that these genuine bills have never been presented. These facts suggest the possibility of looseness in the conduct of the business of the Southern Pacific Company, and in that of Hubbard Bros. & Co.; but they do not indicate that Hubbard Bros. & Co. have suffered, or have been misled, by the negligence of the Southern Pacific Company. The fact that Hubbard Bros. & Co. have received several hundred bales of cotton upon forged bills of lading, and have never been made to account for the cotton thus received, is hardly a sufficient basis for demanding that all subsequent forged bills of lading should have the effect of genuine bills.

3. Discovery of the forgery and institution of suit were within a reasonable time, and there is nothing to indicate that Hubbard Bros. & Co. were damaged by delay.

The Claim against Monroe Bank.

[7] The claim of Hubbard Bros. & Co. against the Monroe National Bank is based upon the propositions: (1) That the draft, as drawn, is not a negotiable instrument; (2) that the figures and letters "214 B/C," in the body of the draft, make the attached forged bills of lading for 214 bales of cotton parts of the draft; (3) that the indorsement of the draft by the Monroe Bank made the bank a guarantor in every respect, except as to the signature of the drawer. The indorsement of an ordinary draft for collection does not make the indorser a guarantor to the drawee of the genuineness of the bills of lading attached, nor of the quantity or quality of the commodity shipped.

[8, 9] Whatever question may have existed with reference to the rule, recent decisions have placed the matter beyond doubt. In Springs v. Hanover National Bank, 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. (N. S.) 241, the cases are reviewed and this conclusion reached. The opinion refers to the fact that there are decisions in Texas, North Carolina, Mississippi, and Alabama to the contrary. The decisions in conflict in at least three of the states have been overruled. Blaisdell v. Bank, 96 Tex. 629, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944; Mason v. Nelson, 148 N. C. 492, 62 S. E. 625, 18 L. R.

A. (N. S.) 1221, 128 Am. St. Rep. 635; Cosmos Cotton Co. v. Bank, 171 Ala. 394, 54 South. 621, 32 L. R. A. (N. S.) 1173, Ann. Cas. 1913B, 42. There being no question of good faith on the part of the Monroe Bank involved, the authorities cited leave for determination only whether the insertion of the figures and letters "214 B/C" in the face of the draft destroys its characteristics as a negotiable instrument, with resulting liability on the part of the bank as for money received from the drawee under a mistake of fact.

At the time of the transaction, the Uniform Negotiable Instruments Law was in force both in New York and Louisiana. Therein a bill of exchange is defined:

"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed and determinable future time, a sum certain of money to order or to bearer." Consol. Laws N. Y. c. 38, § 210; Acts La. 1904, No. 64, § 126.

The act further provides:

"An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional." Consol. Laws N. Y. c. 38, § 22; Laws La. 1904, No. 64, § 3.

Appellants agree that, under the English cases, the draft in question would be held a negotiable instrument. See Guaranty Trust Co. v. Hannay, 210 Fed. 810, 127 C. C. A. 360. But they insist that the law as developed in the United States is different. Appellants cite Hoffman v. Bank, 12 Wall. 181, 20 L. Ed. 366; Goetz v. Bank, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515; Varney v. Bank, 119 La. 943, 44 South. 753, 13 L. R. A. (N. S.) 337; and Springs v. Bank, 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. (N. S.) 241. In each of these cases the drawee was held liable. In the opinion in each case was a suggestion that there was no reference in the face of the draft to the bills of lading. The expressions may properly be used in argument, but in neither case was the point now discussed under consideration, and no great weight can be accorded them. Other cases cited by appellant may be differentiated, or, if not, they are against the weight of recent authority.

The following cases apparently put the matter beyond doubt: Whitney v. Eliot Bank, 137 Mass. 351, 50 Am. Rep. 316; Redman v. Adams, 51 Me. 433; First Nat. Bank v. Lightner, 74 Kan. 736, 88 Pac. 59. In the last-named case the authorities are reviewed.

If the mere insertion of the words "against 214 B/C" in the body of the draft, without grammatical connection with the balance of the instrument, could, under any circumstances, render an otherwise ordinary draft a conditional order on a particular fund, that effect could not follow, in view of the facts developed in this case. The evidence discloses that, for a considerable time prior to the transaction here reviewed, there was a running account between Hubbard Bros. & Co. and Bandy, and at the date of the draft Bandy had a credit with Hub-

bard Bros. & Co. No accounts were kept with particular shipments of cotton. With his cotton business as a basis, Bandy had established a credit, and Hubbard Bros. & Co. were reimbursed by, and made a profit out of, the cotton from the sale of which they were reimbursed. The insertion of "214 B/C" cannot be held more than "an indication of a particular fund out of which reimbursement is to be made."

The judgment is so modified that interest on the amount adjudged against the Southern Pacific Company in favor of the Ouachita National Bank, and against Hubbard Bros. & Co. in favor of the Southern Pacific Company, shall run from November 30, 1904, and, as so modified, it is affirmed.

Modified and affirmed.

(256 Fed. 768)

PANAMA R. CO. v. CURRAN et al.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3237.

1. EXCEPTIONS, BILL OF ⟹36(1)—TIME FOR PRESENTING—STATUTE—CANAL ZONE.

The provision of Panama Canal Act Aug. 24, 1912, that the appellate jurisdiction of the Circuit Court of Appeals on appeals from the District Court of the Canal Zone may be exercised in the same manner, as nearly as practicable, as in reviewing judgments of the District Courts of the United States, shows that the earlier provision of the same section, that existing laws of the Canal Zone should be applicable to practice in new courts, was not intended to make applicable to appeals to the Circuit Court of Appeals Code Civ. Proc. Canal Zone, § 136, requiring bills of exception for review by the Supreme Court of the Canal Zone to be presented to trial court within 10 days.

2. APPEAL AND ERROR ⟹709—COSTS ⟹108—SECURITY—DISCRETION OF COURT—RECORD—EVIDENCE.

The executive order of August 14, 1914, relating to the Canal Zone, that plaintiff in any suit may be required to give security for costs, does not require such security whenever moved for by defendant, but confers on the court discretion to exercise the power, and his denial of a motion to compel a resident plaintiff to give security will not be reversed, where the record does not contain the evidence on the hearing of the motion.

3. APPEAL AND ERROR ⟹684(2)—DISCRETION OF TRIAL COURT—MOTION FOR CONTINUANCE.

The overruling of a motion for a second continuance will not be reversed, where the evidence, if any, adduced on the hearing, is not in the record, so that there is no showing that the ruling was improper.

4. RAILROADS ⟹5½, New, vol. 6A Key-No. Series—LIABILITY FOR TORTS—GOVERNMENT AS STOCKHOLDER.

Since Act June 25, 1910, Act Aug. 24, 1912, § 6 (Comp. St. § 10042), and other statutes and regulations and rulings, indicate an intention to preserve the corporate existence of the Panama Railroad Company, though the government owns all its stock, that corporation may be sued by a private individual for injuries caused by the negligence of its employés.

5. CORPORATIONS ⟹491—LIABILITY FOR TORTS—ULTRA VIRES ACT.

A corporation cannot escape liability for negligent conduct of a business in which it engages, by showing that it was not authorized to carry on that business.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

6. RAILROADS ⟹281(1)—INJURIES TO THIRD PERSON—NEGLIGENCE OF EMPLOYÉS.

Evidence that employés of the Panama Railroad Company oiled the floor of a commissary operated by it, so as to make it dangerously slippery, as a result of which a customer was injured, establishes negligence for which the corporation was liable, under the law of the Canal Zone.

In Error to the District Court of the Canal Zone; Wm. H. Jackson, Judge.

Action by Mrs. T. T. Curran and husband against the Panama Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Frank Feuille, of Ancon, C. Z., and Walter F. Van Dame, of Balboa Heights, C. Z., for plaintiff in error

Stevens Ganson and Theodore C. Hinckley, both of Panama, R. P., for defendants in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. This is a writ of error sued out by the Panama Railroad Company (which will be referred to as the defendant) to obtain a review of a judgment rendered against it in favor of Mrs. T. T. Curran and her husband, T. T. Curran (who will be referred to as the plaintiffs).

[1] The judgment was rendered on the 28th day of November, 1917. By an order entered on the same day the court allowed 20 days for a bill of exceptions. A bill of exceptions was presented and allowed within that time. It was not presented within 10 days after November 28, 1917. The defendants in error move that the bill of exceptions be stricken, on the ground that it was not presented to the judge within 10 days after the court was informed that a bill of exceptions was desired and a memorandum to that effect was entered, as required by section 136 of the Code of Civil Procedure of the Canal Zone with reference to bills of exceptions for the review of final judgments by the Supreme Court of the Canal Zone. The claim that the statute just referred to is applicable is based upon the provision of section 9 of the Panama Canal Act of August 24, 1912 (37 Stat. 565, c. 390 [Comp. St. § 10045]), that "all existing laws in the Canal Zone governing practice and procedure in existing courts shall be applicable and adapted to the practice in the new courts." The same section of the statute which contains the just-quoted provision contains also the provision which confers on this court appellate jurisdiction to review final judgments of the District Court of the Canal Zone in the classes of cases stated. A part of the latter provision is that such appellate jurisdiction "may be exercised by said Circuit Court of Appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the District Courts of the United States." The last-quoted provision makes it quite plain that the first-quoted one does not include the manner of bringing cases from the District Court

of the Canal Zone to this court. The explicit statement that the appellate jurisdiction conferred may be exercised "in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States," shows that existing laws of the Canal Zone were not intended to be made applicable to anything done after judgment looking to a review by this court. Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. Ed. 424; Detroit United Railway v. Nichols, 165 Fed. 289, 91 C. C. A. 257. The bill of exceptions is not subject to be stricken on the ground stated in the motion made to that end.

[2] The court overruled a motion of the defendants that the plaintiffs be required to deposit security for the costs of the suit. The motion was based upon the following provision of an executive order of the President issued on August 14, 1914:

"Section 1. The plaintiff in any civil suit, or special proceedings, may be ruled to give security for the costs upon motion of the defendant, or of any officer of the court interested in the costs accruing in such suit; and if such rule be entered against the plaintiff, and he fail to comply therewith, within the time prescribed by the court or judge thereof, the suit shall be dismissed."

The terms of the quoted order are such as to indicate that it was not intended to require that an order be made that the plaintiff give security for the costs whenever moved for by a defendant, and that an exercise of the power conferred was left to the discretion of the court. The complaint in the cause described the plaintiffs as residents of the Canal Zone. The record does not disclose what, if any, evidence was adduced on the hearing of the motion in question. There was evidence in the trial to the effect that the plaintiffs were residents of the Canal Zone. The quoted order is not to be given the effect of putting it in the power of a defendant to make a resident plaintiff's right to prosecute a suit dependent upon his giving security for the costs. It is not made to appear that there was any abuse of discretion in the disposition made of the motion.

[3] In reference to the complaint as to the action of the court in overruling a motion of the defendant for a second continuance of the cause no more need be said than that it is not made to appear by the record that that ruling was an improper one. It is not disclosed what, if any, evidence was adduced on the hearing of that motion.

[4] The action was for the recovery of damages claimed to have resulted from injuries sustained by Mrs. Curran in consequence of her slipping and falling on the floor of the defendant's commissary or store in the village of Pedro Miguel, Canal Zone, while she was there for the purpose of making purchases. The alleged injuries were attributed to the negligence of the defendant in permitting the floor to be in a dangerously slippery condition. The right of the plaintiffs to maintain the action was brought into question on the ground that the store or commissary at which the injuries complained of occurred was not being operated by the defendant under its charter and by-laws, but, at the time of the injuries alleged and for some years prior thereto, was operated by the defendant as an agency of the government of the

United States in the construction and operation of the Panama Canal. On the cross-examination of R. K. Morris, a witness for the defendant, he stated:

"The commissaries are merely general stores for the benefit of the employés of the Panama Railroad and the Panama Canal. All of the employés have the privilege of going there for the purpose of buying. The goods at the Pedro Miguel commissary are all bought by the Panama Railroad. The commissaries are owned by the Panama Railroad Company, and the proceeds of the sale of these goods go to the railroad, and the railroad uses that money in paying the employés and in buying other goods. All of the employés of the Pedro Miguel commissary are paid by the Panama Railroad, including the employés who oil the floors. The Pedro Miguel has been in operation since 1912 in its present site. We had a commissary there since 1905."

The defendant is a New York corporation. All its capital stock is owned by the United States. Thirteen of the shares stand in the names of the directors of the company. Each of the directors for the time being gives to the Secretary of War an irrevocable power of attorney to transfer the stock standing in his name at any time. This enables that official, when the holder of a share ceases to be a director, to transfer it to the succeeding director. In the manner indicated the government absolutely controls the operations of the company. An intention to preserve the existence of the defendant as a private corporation has been clearly manifested in acts of Congress, some only of which need be mentioned. Act June 25, 1910, c. 384, making appropriation for sundry civil expenses of the government for the fiscal year ending June 30, 1911 (36 Stat. 771), contains an item of $2,000,000 "for the payment of the cost of relocating the Panama Railroad, including salaries, wages, material, and supplies, and all other expenses incident thereto." That act contained the following provision:

"The foregoing appropriations shall be available to reimburse the Panama Railroad Company for marine losses, and for losses due to destruction of or damage to its plant, equipment, or commissary supplies by fire: Provided, that the Panama Railroad Company shall carry no insurance against loss from causes covered by this appropriation: Provided, further, that hereafter payment by the Panama Railroad Company to the United States, in accordance with the treaty with Panama, of the annual subsidy of two hundred and fifty thousand dollars, as provided by the concession granted by the United States of Columbia, shall not be required."

Section 6 of the Panama Canal Act of August 24, 1912 (37 Stat. 560 [Comp. St. § 10042]), contains the following:

"The President is also authorized to establish, maintain, and operate, through the Panama Railroad Company or otherwise, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses, and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs, and supplies for vessels of the Government of the United States and, incidentally, for supplying such at reasonable prices to passing vessels, in accordance with appropriations hereby authorized to be made from time to time by Congress as a part of the maintenance and operation of the said canal. Moneys received from the conduct of said business may be expended and reinvested for such purposes without being covered into the Treasury of the United States; and such moneys are hereby appropriated for such purposes, but all deposits of such funds shall be subject to the provisions of existing law relating to the deposit of other public funds of the United States, and any net profits accruing from such business shall

annually be covered into the treasury of the United States. Monthly reports of such receipts and expenditures shall be made to the President by the persons in charge, and annual reports shall be made to the Congress."

Departmental regulations and rulings indicate that it has been recognized that a purpose of preserving the corporate existence and organization was to make inapplicable to Panama Railroad receipts provisions requiring payment into the treasury of receipts by governmental agents. Whatever the purpose was, such legislation as that which has been mentioned shows that the lawmakers intended the relation between the government and the defendant to be that of a stockholder to the corporation which issued the stock, and not that of principal and agent. This being true, the following statements made in the opinion of Chief Justice Marshall in the case of Bank of the United States v. Planters' Bank, 9 Wheat. 904, 6 L. Ed. 244, are applicable to the facts of the instant case:

"The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it. It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus many states of this Union who have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act."

From the fact that one owns all the stock of a private corporation it does not follow that the acts of the corporation are to be treated, not as its acts, but as the acts of its sole stockholder. Pullman Palace Car Co. v. Missouri Pacific R. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Salas v. United States, 234 Fed. 842, 148 C. C. A. 440. The defendant was not, on the ground mentioned, exempt from the liability asserted against it.

[5] It is not material to inquire whether the defendant, in conducting the store or commissary in which the plaintiff was hurt, was exercising a power conferred by its charter. A corporation cannot escape liability for negligent conduct of a business in which it engages by showing that it was not authorized to carry on that business.

[6] The defendant was not entitled to have the jury instructed to find in its favor on the ground of the absence of evidence tending to prove the negligent conduct alleged. There was evidence tending to prove that the defendant's employés so oiled the floor of the store as to make it dangerously slippery, and that the plaintiff, Mrs. Curran,

while in the store as a customer, was injured in consequence of such negligence. Under the law in force in the Canal Zone the defendant was liable for such negligence. Panama R. Co. v. Bosse, 249 U. S. 41, 39 Sup. Ct. 211, 63 L. Ed. 466, Term, 1918.

Other rulings which are complained of are not such as to call for a discussion of them. The record does not show the commission of any reversible error.

The judgment is affirmed.

(256 Fed. 773)

PANAMA R. CO. v. ROBERT.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3322.

In Error to the District Court of the Canal Zone; Wm. H. Jackson, Judge.

Action by Evelina Robert against the Panama Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank Feuille, of Ancon, C. Z., and Walter F. Van Dame, of Balboa Heights, C. Z., for plaintiff in error.

Stevens Ganson, of Panama, R. P., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PER CURIAM. So far as the questions presented for decision are concerned, there is no material difference between this case and the case of Panama Railroad Co. v. Curran (U. S. Circuit Court of Appeals, 5th Circuit, present term) 256 Fed. 768, 168 C. C. A. 114. Following that decision, the judgment in this case is affirmed.

(256 Fed. 773)

EQUITABLE SURETY CO. v. BOARD OF COM'RS OF MUDDY BOTTOM SWAMP LAND DIST. NO. 1, TIPPAH COUNTY, MISS.

(Circuit Court of Appeals, Fifth Circuit. March 31, 1919.)

No. 3337.

1. PRINCIPAL AND SURETY ⟹151—ACTIONS—PARTIES.
   Ordinarily obligee on bond is proper party to enforce it.

2. DRAINS ⟹49—CONTRACTOR'S BOND—PARTIES.
   Under Code Miss. 1906, § 387, regulating handling of money by swamp land district commissioners, the commissioners may sue contractor's surety in their own name.

3. PRINCIPAL AND SURETY ⟹151—ESTOPPEL—RECEIVING PREMIUM.
   Surety, receiving a premium, is estopped to deny obligee's capacity to sue for breach of bond.

4. PRINCIPAL AND SURETY ⟹123(1)—NOTICE TO SURETY—NECESSITY—"DEFAULT."
   The contract requirement of exertion by contractor of all reasonable diligence and activity being for the benefit of the obligee on the contractor's bond, the obligee, by failing to treat a less amount of diligence as a default, waived it, and was not required to give the surety notice there-

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of; it not being in such case a "default" within the meaning of the contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Default.]

5. WITNESSES ⟹244, 255(9)—EXAMINING WITNESSES—LEADING QUESTIONS—REFRESHING RECOLLECTION.

In action on surety's bond, court did not abuse its discretion in allowing surety's former manager when called as witness for plaintiff, to be examined and led as a hostile witness, and his memory refreshed by a deposition previously made by him.

6. PRINCIPAL AND SURETY ⟹162(2)—JURY QUESTION—MISREPRESENTATION.

In action on surety's bond, evidence that surety's manager construed contract as authorizing payment of disputed item to contractor, etc., *held* to make a jury question whether such payment was authorized by contract.

7. PRINCIPAL AND SURETY ⟹162(2)—JURY QUESTION—MISREPRESENTATION.

In action on surety's bond, evidence that consideration named in drainage contract was subject to discount under another contract, etc., made a jury question whether plaintiff made a material false representation to defendant surety that contractor would receive amount stated in original contract.

8. PRINCIPAL AND SURETY ⟹162(2)—JURY QUESTION—MISREPRESENTATION.

In action on a surety's bond, conflicting evidence *held* to make jury question whether plaintiff falsely represented to defendant surety that bond was to cover additional work, for which contractor would receive additional pay.

9. PRINCIPAL AND SURETY ⟹145(1)—EVIDENCE—ADMISSIBILITY.

In action on surety's bond, judgment against principal for breach of contract is admissible as prima facie evidence of principal's default, even against surety.

10. DRAINS ⟹49—CONTRACTOR'S BOND—AMOUNT OF RECOVERY.

In action on swamp land district contractor's bond, actual loss suffered from having to relet work may be recovered, including sums not yet due under the new contract.

In Error to the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Action by the Board of Commissioners of the Muddy Bottom Swamp Land District No. 1, Tippah County, Miss., against the Equitable Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 231 Fed. 33, 145 C. C. A. 221; 246 Fed. 633, 158 C. C. A. 589.

C. L. Sivley, of Memphis, Tenn. (Sively, Evans & McCadden, of Memphis, Tenn., on the brief), for plaintiff in error.

Thomas E. Pegram, of Ripley, Miss., Lester G. Fant, of Holly Springs, Miss., and William M. Hall, of Memphis, Tenn., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This is a writ of error to a judgment in favor of the defendant in error, plaintiff in the District Court, against the plaintiff in error, which was defendant in that court, upon two

surety bonds, executed by it as surety, payable to the defendant in error, and conditioned to secure the faithful performance of a contract entered into between the defendant in error and the Delta Drainage Company, which was the principal, for the cutting of a drainage canal. The case has been heretofore twice before this court. On the first trial the defendant in error obtained a judgment in the District Court, which was reversed by this court because of the refusal of the District Court to give certain charges requested by the plaintiff in error. Equitable Surety Co. v. Board of Commissioners, 231 Fed. 33, 145 C. C. A. 221. On the second trial in the District Court the District Judge directed a verdict for the present plaintiff in error, and the present defendant in error sued out a writ of error from the judgment then rendered, which was reversed by this court for that reason. Board of Commissioners v. Equitable Surety Co., 246 Fed. 633, 158 C. C. A. 589. The law of the case has been pretty well established by the two former opinions of the court. A recital of the facts is unnecessary, in view of the statement of facts contained in the former opinions. The difference between the facts upon the first trial and the trial from the judgment following which the present writ of error was taken consists very largely in the evidence of plaintiff in error's former manager at Memphis, one Morrison, who was a witness on the second and third, but not on the first, trial of the case.

[1-3] The first ground for reversing the judgment advanced by plaintiff in error is that the suit should have been instituted in the name of board of supervisors of Tippah county, and not in the name of defendant in error. The bond sued upon was payable to defendant in error, and not to Tippah county, or to its board of supervisors. The general rule is that the obligee of a bond is the proper party to enforce it. 32 Cyc. 123; 9 Corpus Juris, 85; Cass County v. Johnston, 95 U. S. 360, 24 L. Ed. 416; Tyler v. Hand, 7 How. 573, 12 L. Ed. 824; Davenport v. County of Dodge, 105 U. S. 237, 26 L. Ed. 1018. The statute of Mississippi (section 387, Code of Mississippi of 1906) provides that the board of supervisors of the county shall sell the bonds issued for drainage purposes, and turn over the proceeds to the commissioners of the district to be by them expended in the drainage of the land, and in payment of the expenses incident thereto, and the commissioners are required to give bond for more than the amount of the funds received, conditioned to faithfully apply and account to the county for the money received. It seems, in view of this legislation, that they are entitled to sue in their own name for a liability on a bond, the recovery on which would be funds in their hands for which they would be accountable under the statute. Certainly the plaintiff in error, after receiving a premium, as a consideration for executing a bond in which the defendant in error was named as obligee, is estopped to deny the capacity of the obligee to sue for a breach of the bond. Tyler v. Hand, 7 How. 572, 583, 12 L. Ed. 824. The same point was made on the former appeals; on the first, it was reserved; on the second, it was not expressly referred to, but was impliedly passed upon adversely to plaintiff in error's contention, since the case was remanded for a third trial in its then form.

The second point presented is the refusal of the District Judge to direct a verdict for plaintiff in error. This contention was determined adversely to the plaintiff in error upon the second appeal. 246 Fed. 633, 158 C. C. A. 589.

[4] The third complaint is that the court failed to charge upon the effect of want of notice to plaintiff in error of the contractors' default, and refused requested instructions on that issue. The defendant in error gave prompt notice to the plaintiff in error, within the 10 days prescribed by the bond, of the default of the contractors in finally abandoning the work. No criticism is made of the sufficiency of this notice. It is claimed, however, that there was a previous default by the contractors, in that they did not exert all reasonable diligence and activity to accomplish the proper completion of the work, as stipulated by the contract, and that no notice was given of this default, as required by the bond.

The requirement of the exertion of all reasonable diligence and activity was for the benefit of the defendant in error, which it had the election to insist upon or waive. If the defendant in error failed to treat a less amount of diligence on the part of the contractors as a default, it thereby waived the default arising therefrom, and was not required to give the plaintiff in error notice of what was not in that event a default, within the meaning of the contract. The record shows that the defendant in error first claimed a default only when the contractors gave notice that they would no longer proceed with the contract, and of this default the required notice is conceded to have been given.

[5] The fourth point relied upon by the plaintiff in error to reverse the judgment is in relation to the treatment of the witness Morrison, who was examined by the defendant in error, though summoned by the plaintiff in error. The plaintiff in error insisted on his oral examination, when defendant in error sought to introduce his deposition. The defendant in error was permitted by the court to ask the witness leading questions, and to attempt to contradict him by his former evidence, taken by deposition. It was within the discretion of the court to treat the witness as hostile to the defendant in error, under the circumstances, and, as such, to permit him to be led, and his recollection to be refreshed by his deposition. We cannot say that the discretion was abused.

[6] The plaintiff in error complains, as a fifth ground of reversal, of the charge of the court, and of the refusal of the court to give certain requested instructions with respect to the effect of certain advances made by the defendant in error to the contractors, before the work done by the contractors justified the making of the advances, under the terms of the contract as claimed by the plaintiff in error. The principal item was an advance of $4,500 for the purchase of machinery by the contractors for the digging of the canal. Upon the first appeal the court construed the contract between the defendant in error and the contractors as giving the former the right to decline to make payments under the contract until the work done equaled the payment made, and held that if the defendant in error departed from the contract, and paid the con-

tractors money in advance of the time, it could be required or reasonably expected thereunder that the surety company, plaintiff in error, would be released. The evidence on the second and third trials differed from that on the first trial, in that the witness Morrison testified upon the second and third trials, but not upon the first trial. His testimony upon both the second and third trials was to the effect that he understood the provision of the contract as to payments as making it permissible for the defendant in error to advance or pay to the contractors the amounts required to pay the price of and the freight on machinery or implements needed by the contractors to enable them to do the work contracted for. The present record also shows that the machinery was mortgaged to the plaintiff in error as indemnity, and its purchase known to and approved by the representative of the surety company. This court, on the second appeal, with reference to this evidence, said:

"A finding that the defendant's sole representative so understood the proposed contract hardly would be reconcilable with one that the defendant, in consenting to become the contractors' surety, was influenced by the consideration that the contract protected it from liability for losses resulting from payments or advances made by the plaintiff to the contractors for such a purpose. However that may be, evidence above mentioned of payments to the contractors for work contracted for made after that work was done was enough to make it a question for the jury whether the contractors' abandonment of the work before it was completed entailed upon the plaintiff a loss which was chargeable against the defendant, the contractors' surety. In view of that evidence, the second above-mentioned defense cannot be regarded as having been so made out as to justify the giving of the instruction complained of." Board of Commissioners v. Equitable Surety Co., 246 Fed. 633, 636, 158 C. C. A. 592.

The court below rightly refused the direction of a verdict, and properly instructed the jury on the issue in conformity with the opinion of this court. In any event, it seems difficult to see how any unauthorized advances could effect more than a destruction of defendant in error's right to have them included in its damages, and all the requested instructions refused on this question went to the extent of denying all right of recovery to the defendant in error.

[7] The plaintiff in error also complains, as a sixth ground of reversal, of the charge of the District Judge upon the issue as to whether the defendant in error misrepresented to the plaintiff in error the amount of compensation agreed to be paid the contractors for the work to be done by them. On the first appeal this court held that there was an issue of fact in this respect, as to whether there was a representation that the contract price of the work was falsely represented as being $19,500, instead of $18,000, and as to whether such a misrepresentation, if made, materially increased the surety company's risk. Upon the second trial a verdict was directed against the present defendant in error, which was held to be error upon the second appeal; this court holding that all the three defenses presented to the cause of action presented issues of fact. There were opposing versions of this question, also, on the third trial. The plaintiff in error contended that a discount paid by the contractors to the taker of the bonds was, in effect, a diminution of the consideration expressed in the contract for

the doing of the work. The defendant in error contended that the agreement of the contractors to pay the discount was a separate one from the working contract, and so did not affect the consideration agreed to be paid the contractors by the terms of the contract. The District Judge, under proper instructions, left the solution of this question, as well as that of the question as to whether there was a representation made by the defendant in error to plaintiff in error as to the amount to be paid the contractors, and of its materiality, if made and untrue, to the jury, in conformity to the previous opinions of this court in the case.

[8] Two bonds are sued upon. The first contained a penalty of $5,000. After its execution, and after the machinery was purchased by the contractors and the money therefor advanced by the defendant in error, the defendant in error required the contractors to give an additional bond of $2,500, which it did, with the plaintiff in error as surety. The plaintiff in error contends, in the seventh place, that one of the commissioners, McBride, caused the agent of the contractors to represent to the agent of the surety company that the second bond was for additional work, which, under the original contract, was to be paid for at an increased price, and that this was untrue, and that the risk would have been less, if it had been true. The making of the representation by the defendant in error was disputed by it, and the District Judge submitted this question, as well as the materiality of the representation, if made, to the jury, under a fair charge, for its determination, as was directed to be done by this court. The subject-matter of the plaintiff in error's requested instructions, refused by the District Judge, relating to this question, was fully covered by the court's general charge.

[9] The plaintiff in error complains, in the eighth place, of the admission in evidence of the judgment obtained at a previous term of the District Court by the defendant in error against the contractors for a breach of the contract the bond sued upon was given to secure. The judgment was prima facie evidence of the principal's default, even against his surety, and was properly admitted. Moses v. United States, 166 U. S. 571, 600, 17 Sup. Ct. 682, 41 L. Ed. 1119.

[10] The measure of damages fixed by the court represented the actual loss the defendant in error suffered from having to relet the work, and was the proper one. The fact that the second contractor had not as yet claimed the difference not due him under his contract till the end of the litigation is unimportant.

Finding no error in the record, the judgment is affirmed, with costs.

Affirmed.

(256 Fed. 779)

MYRES v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1919. Rehearing Denied June 25, 1919.)

No. 3189.

1. HOMICIDE ⟹300(1)—INSTRUCTIONS—SELF-DEFENSE—EVIDENCE.
The killing being when deceased was standing inoffensive and unarmed, in peaceful conversation with third person, submission in instruction of issue of self-defense, even under rule of apparent danger, is not required, on evidence merely that deceased, who had a bad reputation for peace and quietness, had recently threatened defendant's life, and had his hand in his pocket, where it remained till he was shot.

2. HOMICIDE ⟹253(1)—MURDER IN FIRST DEGREE—MALICE AFORETHOUGHT—EVIDENCE.
Evidence in homicide case *held* to warrant finding of capacity to form, and of forming, deliberate and malicious intent to kill, necessary for murder in first degree.

3. HOMICIDE ⟹22(1), 28—RESPONSIBILITY—INTOXICATION—MENTAL CONDITION.
Abnormal mental and nervous condition, during recovery from spree, of one committing homicide, does not serve to excuse or lower the degree of his offense, provided he was capable of knowing right from wrong, and had will power to do right and abstain from wrong, and capacity to form the deliberate and malicious intent necessary for first degree murder.

4. COURTS ⟹337—FEDERAL COURTS—FOLLOWING STATE PRACTICE—CRIMINAL PROCEDURE.
The federal courts in criminal procedure do not follow the practice of the courts of the states in which they sit.

5. COURTS ⟹337—PROCEDURE OF STATE COURTS—DOCUMENTARY EVIDENCE—AUTHENTICATION.
Provision of Rev. St. § 906 (Comp. St. § 1520), authorizing use in federal courts of authenticated documents from state courts and offices, that they shall have such faith and credit given them as they have by law or custom in the courts or offices of the state, is not an adoption of the rules of practice, under the state's law, as to the preliminaries necessary for their introduction, as length of time of filing before trial and notice to adverse party.

6. CRIMINAL LAW ⟹1213—CRUEL AND UNUSUAL PUNISHMENT—GRIEVANCE WITH VERDICT.
Grievance, on which is bottomed complaint that infliction of sentence of life imprisonment for a murder committed while defendant was in an abnormal mental condition is a cruel and unusual punishment, in violation of the Constitution, is not with the sentence, but with the verdict of first degree murder.

7. INDICTMENT AND INFORMATION ⟹110(17)—MURDER—FELONIOUSLY.
Indictment for murder need not use the word "feloniously"; it not being used in Pen. Code, §§ 273, 274 (Comp. St. §§ 10446, 10447), creating the offense, and defining murder, its two degrees, and manslaughter.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Frank Myres was convicted of murder in the first degree, and brings error. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

John T. Hill, of El Paso, Tex., for plaintiff in error.

R. E. Crawford and W. H. Fryer, Asst. U. S. Attys., both of El Paso, Tex.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The plaintiff in error was convicted in the District Court of the crime of murder in the first degree, and sentenced to imprisonment for life, the verdict of the jury excluding capital punishment. The judgment of conviction is assailed upon six grounds, which will be passed upon in order.

[1] 1. The plaintiff in error complains that the issue of self-defense was not submitted to the jury in the general charge of the court, and because the court refused to defendant an instruction presenting that issue. The record shows that the issue was not presented in either way to the jury. The question is whether there was evidence to support it. It is conceded that the undisputed facts show that the defendant was in no real danger of life or great bodily harm from deceased when he killed him. The contention is that there was evidence of apparent danger from defendant's viewpoint, which required a submission of the issue of self-defense to the jury; i. e., that the defendant had reasonable grounds for believing that the deceased was about to draw a pistol from his pocket and shoot him.

There is evidence that the deceased had, shortly before he was killed, and on the same day, threatened to kill the defendant before sundown. Both were noncommissioned officers in the same company, stationed at Ft. Bliss, Tex. The defendant had been on a spree during the Christmas holidays, from which he was recovering on the day of the killing. He had had a dispute on the morning of that day with deceased, who refused to permit him to have a saw sharpened, and it was after this that the alleged threats were made by the deceased. The killing occurred about 12:30 p. m. in the company street. About noon the defendant went to the deceased's tent and inquired for him. Not finding him there, he returned to his own tent, loaded his pistol, and went out of his tent, into the company street. The deceased had been to the company commander's house, and was returning along the company street. He passed another sergeant, named Hixon, in the company street, and, after passing him, turned and accosted him, and began a conversation with him, while both were standing in the company street. The defendant, after leaving deceased's tent, discovered deceased in the street, talking with Hixon, and, approaching him, shot him first in the right arm, and then three times in the body; the deceased sinking to the ground after the first or second shot. The defendant, after the fourth shot, threw his pistol on the ground, and then picked it up and pointed it at deceased, but it failed to go off. After the deceased was shot he only said: "You've got me." The defendant said nothing before or immediately after the shooting.

The deceased was unarmed; his pistol being in his tent at the time he was killed. During the conversation with Hixon he stood with his right hand in his pocket, but, according to the undisputed evidence,

made no effort to withdraw it, and did nothing that could be construed as a hostile demonstration of any kind, and was unaware of the presence of the defendant until the first shot was fired by defendant. The defendant did not testify in his own behalf, and there is no dispute about the immediate facts of the occurrence, and they are as stated. The deceased had a bad reputation for peace and quietness. Unless we are prepared to say that a man who has recently threatened another's life can be justifiably killed by that other when he is standing unarmed and inoffensive, engaged in peaceful conversation with a third person, merely because his hand is in his pocket, where it remains till he is shot, we cannot say that there was any evidence to support the issue of self-defense in this case, for this is what the undisputed evidence in the record discloses. The District Judge rightly refused to submit that issue to the jury.

[2, 3] 2, 3. The plaintiff in error contends that a verdict of murder with malice aforethought was improper, in view of defendant's mental condition at the time of the killing, due to previous intoxication, and that the defendant should either have been acquitted by reason of insanity, or convicted of a lower degree of crime. The District Judge charged on the various degrees of murder and upon manslaughter; also upon the effect of insanity and drunkenness upon the degree of crime as affecting the specific intent required to be proven. No complaint is made of the charge in any of these respects. The complaint is with the finding of the jury upon the facts, under the court's unchallenged charge. That there was evidence justifying the jury in determining that the defendant was not excused by insanity for the killing is clear. The defendant was doubtless in an abnormal mental condition, due to the spree he was just recovering from, and, as a result, he magnified trifles, permitted them to prey upon his mind, with the result of resenting them in a way he would not have done, if free from the influence of liquor.

The evidence would have justified the jury, however, in finding that he was not drunk on the day of the killing. It was conceded that he had charge of the company camp on that day, though the evidence tends to show he performed his duties indifferently. There is evidence that he acted abnormally, and also evidence that he was able to act and perform his duties without causing comment. The jury had evidence before them that would have justified them in finding that there was nothing different in his condition from that of any man whose nerves were affected by recent intoxication, and whose predisposition was to nurse grievances and resent trifles. The law neither excuses nor mitigates crime because of such a condition, self-imposed by the defendant. The evidence shows that the defendant, at least half an hour before he killed the deceased, sought deceased in his tent, and, not finding him there, returned to his own tent, loaded his pistol, continued his quest, and immediately upon discovering him, and without accosting him, commenced to shoot at him, and continued till he was mortally wounded. The jury might well have deduced from this the capacity of the defendant to form the deliberate and malicious intent to kill, necessary to constitute murder in the first degree.

After the occurrence the defendant was in a nervous state, due to the excitement and his weakened condition. While his condition, when he committed the offense, and his previous good character, when not intoxicated, might form the basis of an appeal for executive clemency, they do not serve to excuse or lower the degree of his offense in the eye of the law, provided they left him with the capacity to know right from wrong and the will power to do right and abstain from the wrong, and the capacity to form the deliberate and malicious intent necessary to the crime of murder in the first degree. The jury have found against him on these issues upon evidence sufficient to justify them in so doing, and there is no redress available to him in the courts.

[4, 5] 4. The plaintiff in error complains of the admission of certified copies of the deeds of the owners of the lands constituting the government reservation at Ft. Bliss, and the deed of the Governor of Texas, ceding jurisdiction over it to the United States, upon the ground that, under the Texas Civil Code, such certified copies are admissible, in civil or criminal proceedings, only when filed three days before the trial, and when notice of the filing is given the adverse party. The United States courts, in criminal procedure, do not follow the practice of the state courts of the states in which they sit. Section 906, Revised Statutes of the United States (Comp. St. § 1520), authorizes the use in the federal courts of authenticated documents from state courts and offices. It provides that such certified records "shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken." The effect of this provision is not an adoption of the rules of practice as to the preliminaries necessary to the introduction of certified records fixed by state statutes, but to give to such certified copies, when introduced, the like faith and credit that they are accorded in the courts of the state.

[6] 5. The plaintiff in error complains that the infliction of a sentence of life imprisonment in the penitentiary for a murder committed while the defendant was in an abnormal mental condition is a cruel and unusual punishment, and contrary to the federal Constitution. It will not be contended that life imprisonment is too severe a punishment for murder in the first degree, or that it is an unusual one for that crime. The defendant was adjudged guilty of that crime, after a jury had found him guilty. The complaint, if there is any, is therefore with the verdict and judgment of conviction, and not with the sentence. An innocent man, legally convicted, would be in the same attitude. Any punishment of an innocent man would be cruel and unusual; but his grievance would be against the verdict, and not against the sentence.

[7] 6. The plaintiff in error lastly criticizes the indictment because it does not charge that the offense was feloniously committed. The crime of murder under the federal law is defined by statute to be "the unlawful killing of a human being with malice aforethought." In defining murder in the first and second degree, and also manslaughter, the Penal Codes does not make use of the word "feloniously." The

offense being created and defined by statute, and the statute not using the word "feloniously" in defining the crime, the indictment need not charge that it was done feloniously. Penal Code (Act March 4, 1909, c. 321) §§ 273, 274, 35 Stat. 1143 (Comp. St. §§ 10446, 10447); Bannon and Mulkey v. United States, 156 U. S. 464, 467, 15 Sup. Ct. 467, 39 L. Ed. 494; United States v. Staats, 8 How. 41, 12 L. Ed. 979.

We find no error in the record, and the judgment is affirmed.

(256 Fed. 783)

MELANSON v. UNITED STATES.

ELLSWORTH v. SAME.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1919.)

Nos. 3195, 3200.

1. POISONS ⟹9—VIOLATION OF NARCOTIC ACT—AVERMENT OF CHARACTER OF DRUGS.

An indictment charging violation of the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), which averred that defendant at the time of the offense knew that cocaine was a derivative of coca leaves, and that morphine and heroin were salts and derivatives of opium, sufficiently averred by implication the fact that cocaine was a derivative of such leaves, and that morphine and heroin are salts or derivatives of opium.

2. CRIMINAL LAW ⟹1186(4)—INDICTMENT—APPEAL—HARMLESS IMPERFECTIONS.

In view of Rev. St. § 1025 (Comp. St. § 1691), imperfections in indictment for violating the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), in that it did not aver that cocaine is a derivative of coca leaves, and that morphine or heroin are salts or derivatives of opium, *held* harmless imperfections, carrying no consequences.

3. INDICTMENT AND INFORMATION ⟹111(1)—HARRISON NARCOTIC ACT—FAILURE TO AVOID EXCEPTIONS OF ACT.

Under Harrison Narcotic Act, § 8 (Comp. St. § 6287n), indictments charging violation of the act were not defective, because not averring facts showing defendants did not come within any of the exceptions of the act.

4. POISONS ⟹9—HARRISON NARCOTIC ACT—DERIVATIVES OF DRUGS—SUFFICIENCY OF EVIDENCE.

In prosecutions for violating and conspiracy to violate the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), evidence in one case *held* sufficient to show the drugs, cocaine, morphine, and heroin, are salts and certainly derivatives of coca leaves or opium, and, in the second case, sufficient to authorize submission of the issue to the jury.

5. CRIMINAL LAW ⟹304(1)—JUDICIAL NOTICE—FACTS OF CHEMISTRY.

The courts take judicial notice of the facts of chemistry contained in the United States Pharmacopœia.

6. CRIMINAL LAW ⟹371(1)—OTHER OFFENSES—SALE OF NARCOTICS—EVIDENCE—INTENT.

In prosecution of a physician for violating the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), order forms used by defendant to procure morphine from a druggist, other than the one with whom he was charged with having conspired and with having made a sale, were admissible on the issue of intent to furnish the drug to an addict, and not to aid or cure a patient in his practice as a physician.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

7. CRIMINAL LAW ⟹472—HARRISON NARCOTIC ACT—EXPERT EVIDENCE.
In prosecution of physicians for violating the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), the testimony of qualified medical experts that the prescribing of the drug under stated quantities and circumstances would not be in the course of a physician's regular practice was admissible, on the issue whether the drug was dispensed in the legitimate course of defendants' practice as physicians.

8. CONSPIRACY ⟹48—HARRISON NARCOTIC ACT—GUILT OF PHYSICIANS—QUESTION FOR JURY.
In prosecutions of physicians for having conspired to violate the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), and having made sales illegally, question whether or not each defendant had conspired with a druggist, a codefendant, to dispense the drug in the guise of prescriptions to patients, but really to addicts for the gratification of their appetite, and not for their cure, *held* for the jury under the evidence.

9. POISONS ⟹9—HARRISON NARCOTIC ACT—PROSECUTION OF PHYSICIANS—QUESTIONS FOR JURY.
In prosecution of physicians for sale of drugs in violation of Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), whether dispensing of drug in each case was a dispensing of it by a physician to a patient, in which case no order form was required, or whether the form of prescription was used by defendants as an evasion of the law, and not in good faith, in which case the dispensing would be a sale, and an order form necessary to bring it within the law, *held* for the jury.

10. POISONS ⟹9—HARRISON NARCOTIC ACT—CHARACTER OF DRUG USERS—KNOWLEDGE OF PHYSICIANS—QUESTIONS FOR JURY.
In prosecution of physicians for having violated the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), whether two persons were consumers of the drug and not patients of defendants, and whether defendants and the druggist on whom they issued prescriptions, their codefendant, knew the true character in which such persons sought to procure drugs, *held* for the jury.

11. CRIMINAL LAW ⟹1177—HARMLESS ERROR—ESTABLISHMENT OF ONE OF TWO COUNTS—SENTENCE.
If either count of indictments for having violated and having conspired to violate the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q) was established, defendants have no just complaint; the sentence imposed having been within the maximum prescribed for the offense charged in either count.

12. POISONS ⟹9—HARRISON NARCOTIC ACT—FAITH OF PHYSICIANS—SUBMISSION OF ISSUE.
In prosecution of physicians for having violated and conspired to violate the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), the trial court in his general charge properly submitted an issue as to the good faith of defendants in issuing their prescriptions to supposed patients, since the defendants could only protect themselves if the prescriptions were issued legitimately in their practice.

In Error to the District Court of the United States for the Western District of Texas; William R. Smith, Judge.

M. C. Melanson and Guillermo Q. Ellsworth were convicted of violations of and conspiracy to violate the Harrison Narcotic Act, and they bring error. Affirmed.

Volney M. Brown, of El Paso, Tex. (R. C. Walshe, C. M. Wilchar, and A. J. Harper, all of El Paso, Tex., on the brief), for plaintiffs in error.

R. E. Crawford and W. H. Fryer, Asst. U. S. Attys., both of El Paso, Tex.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The plaintiffs in error were convicted under two separate, but similar, indictments; each charging violations of section 2 of the Harrison Narcotic Act (Act Dec. 17, 1914, c. 1, 38 Stat. 786 [Comp. St. § 6287h]), and of a conspiracy to violate that section of the act, under section 37 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]), in separate counts. The trials were separate, but the questions presented by the appeals, with one exception, are the same.

Each defendant was charged with having conspired with one M. A. Dolan, who was a druggist, and who was a joint defendant in each indictment. The plaintiffs in error were each physicians. The gist of the conspiracy charged in the first count of each indictment was that the defendants were to write prescriptions for alleged patients, calling for morphine or cocaine, which were to be filled by their codefendant Dolan; all the defendants knowing that the alleged patients were not being treated by the physicians in the course of their legitimate practice, but were being furnished the drugs to appease their appetites for it. The first count in each indictment charged a conspiracy. The second count charged a joint sale by the physician and druggist without the use of the order form, required by the law to be used and filed in making sales, other than to patients in the regular practice of a physician on prescription, or by personal administration.

The plaintiffs in error first question the sufficiency of the indictments in two respects.

[1, 2] The first count is criticized because it contains no direct averment that cocaine is a derivative of coca leaves, and that morphine and heroin are salts or derivatives of opium. It is averred in the first count of each indictment that the respective defendants, at the time of the commission of the offense, knew that cocaine was a derivative of coca leaves, and that morphine and heroin were salts and derivatives of opium. It is difficult to see how they could know this to be a fact, unless it was a fact, and the averment that it was known by them to be a fact implies the averment that it was a fact. It certainly informs the defendants sufficiently of the charge against them, and, if an imperfect averment, is a harmless imperfection, carrying no consequences, in view of R. S. § 1025 (Comp. St. § 1691).

[3] The indictments are also criticized because they do not aver facts showing that the defendants did not come within any of the exceptions of the act. In the cases of Thurston v. United States, 241 Fed. 335, 154 C. C. A. 215, and Fyke v. United States, 254 Fed. 225, 165 C. C. A. 513, we held that the provisions of section 8 of the act (Comp. St. § 6287n) made it unnecessary for the government either to aver or prove facts excluding defendants from the excepted classes.

[4, 5] It is objected that there should have been evidence introduced by the government that cocaine was a derivative of coca leaves, and that heroin and morphine were salts of opium. In the Ellsworth Case, the plaintiff's witness Will S. Wood testified as follows:

"Morphine is an alkaloid of opium, and heroin is a derivative of opium, and cocaine is an alkaloid of coca leaves. Alkaloid means the principal agent of opium. Cocaine is a principal agent of coca leaves; it comes from coca leaves. Morphine and heroin both come from opium."

No transaction in heroin was relied upon by the plaintiff as a ground for conviction. The first count of the indictment alleged that—

"morphine was a salt and derivative of opium, and that heroin was a salt and derivative of opium, and that cocaine was a salt and derivative of coca leaves."

The second count contained this averment:

"Said morphine (referring to that charged to have been unlawfully sold) being a salt and derivative of opium."

We think the proof in the Ellsworth case was sufficient to show that the drugs were salts, and certainly derivatives, respectively, of coca leaves or opium. The proof as to this fact is not as specific in the Melanson case, but was sufficient to authorize submission of the issue to the jury, if, indeed, proof of such a scientific fact was required. The courts take judicial knowledge of the facts of chemistry contained in the United States Pharmacopœia.

[6] In the case of Melanson v. United States, objection is made to the action of the District Court in permitting the plaintiff to introduce in evidence certain order forms, used by the defendant Melanson for the procuring of morphine from a druggist other than the one with whom Melanson is charged with having conspired in the first count, and with having made a sale jointly, in the second count. A physician, under the terms of the law, may legally dispense the drug, either by prescription or by personal administration, in the legitimate course of his practice. The issue was presented under both counts as to whether the drug was dispensed in the legitimate course of Melanson's practice. The issue involved the question of the good faith of defendant as a physician in dispensing the drug. If dispensed in the legitimate course of his practice, the law was not violated. If the prescription was a cloak to cover a dispensing, not to aid a cure, but to furnish the drug to an addict to satisfy his appetite, the law was violated. The question depended upon the good or bad faith of the physician, and this involved his intent. Upon the question of intent, the quantities in which the defendant Melanson procured the drug reflected upon the question of his intent or good faith in dispensing it. The defendant Dolan entered a plea of guilty, and was not tried with Melanson. The issue of Melanson's intent being involved, the plaintiff was entitled to show on that issue, if it could, that the amounts of the drugs Melanson had procured, at or about the time of the alleged commission of the offense, from all sources, exceeded what would be required for his legitimate practice.

[7] The plaintiffs in error further complain that the court permitted the witnesses Dr. Jamison and Dr. Rogers, in the Melanson case, and Dr. Rogers, in the Ellsworth case, to testify that the prescribing of the drug under stated quantities and circumstances would not be in the course of a physician's regular practice. The witnesses qualified as medical experts, and were entitled, as such, to give opinion evidence.

The issue being whether or not the drug was dispensed in the legitimate course of defendants' practice as physicians, the evidence was germane to that issue; and, being competent expert testimony, the District Court properly permitted it to be introduced.

[8] Both plaintiffs in error contend that the evidence of the government was insufficient to show (1) a conspiracy under the first count; or (2) an illegal sale, because not made in response to an order on an order form, as charged in the second count. In the Ellsworth case the evidence showed that the defendant Ellsworth had issued in the period three months before the prosecution was instituted 700 prescriptions for the drugs, all of which had been filled by his codefendant Dolan, or his employés, and in quantities varying from 15 grains to 60 grains. The evidence also showed that prescriptions of the kind and quantity shown to have been issued by Ellsworth, and in the aggregate amount for the period, could not have been issued in the course of his professional practice legitimately. In the Melanson case, the evidence showed that the defendant Melanson had an office in the rear of his codefendant's drug store; that during a like period he had issued 900 prescriptions for the prohibited drugs, which had been filled by Dolan or his employés; and that no prescription for any other kind of drugs had been issued by Melanson to be filled by Dolan or his employés during that time. The evidence also showed that the prescriptions were of a character, and for an amount, that would not be issued by a physician in the course of his professional practice. This was sufficient evidence in each case for submission to the jury, upon the issue as to whether or not each of the defendants had conspired with Dolan to dispense the drug, in the guise of prescriptions to patients, but in fact to them as addicts, for the gratification of their appetite, and not for their cure.

[9-11] The plaintiffs in error also contend that the evidence was insufficient to show an illegal sale under the second counts of the two indictments. The contention is that, when the drug is prescribed by a physician, it is not required to be in pursuance of an order from the patient on an order form. Conceding this to be the law, it was for the jury to determine, in each case, whether the dispensing of the drug, in the one case to Clifford Frank, and in the other case to W. Banning, was a dispensing of it by a physician to a patient, in which case no order form was required, or whether the form of a prescription was used by the defendants as an evasion of the law, and not in good faith, in which case the dispensing would be a sale, and an order form would be necessary to bring it within the law. The amount of the drug prescribed in the Ellsworth case to Clifford Frank, and the frequency, amount, and circumstances attending the issuance of the prescription to Banning and others, and Banning's own testimony as to its intended use, and Melanson's probable knowledge thereof, made it a question for the jury to determine whether Frank and Banning were consumers of the drug, and not patients of defendant, and whether Melanson and Ellsworth and Dolan knew the true character in which they sought to procure it from defendants. In the latter event, the transaction would be a mere sale, and could be validated only if made upon receipt

of an order form from the respective purchasers. If either count of the indictment was established, the defendants have no just complaint, since the sentence imposed was within the maximum prescribed for the offense charged in either count.

[12] The plaintiffs in error also complain because the District Judge, in his general charge to the jury, submitted the issue as to the good faith of the defendants in issuing the prescriptions to the supposed patients. We think this issue was a pertinent one. The defendants could only protect themselves, under the act, if the prescriptions were issued in the legitimate course of their professional practice. The law does not mean by this to immunize those who use the form of the relation of physician and patient as a mere method to avoid the law's penalties, when in fact they are dispensing the drug, not to cure a patient, but to satisfy the craving of an addict, who bears no such relation to them. If the act were given that construction, it would be valueless to remedy the evil aimed at, since physicians could register, and with impunity furnish the drug, through pretended prescriptions, in collusion with registered druggists.

We find no error in the records, and the judgment in each case is affirmed.

(256 Fed. 788)

MORRIS LAND & CATTLE CO. v. KILPATRICK et al.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1919.)

No. 3268.

1. APPEARANCE ⟹20—GENERAL APPEARANCE—WAIVER OF ISSUANCE OF PROCESS.

   On information for forfeiture of cattle imported from Mexico without entry and inspection, where, when defendant filed exception or motion that the part of the intervener's answer which prayed judgment against defendant be stricken out, defendant was represented in the cause by attorneys whose appearance was general, by appearing and pleading to the claim asserted against it by the intervener's answer, defendant waived the issuance of process, and by invoking decision as to the merits of the claim asserted abandoned any rights it might have had to refrain from joining issue until notified or required.

2. APPEAL AND ERROR ⟹1026—REVERSAL—HARMLESS OMISSION.

   A judgment is not to be reversed because of an omission which did not have the effect of depriving the party complaining of any substantial right.

3. ANIMALS ⟹35—CUSTOMS DUTIES ⟹130—UNLAWFUL IMPORTATION OF CATTLE—FORFEITURE—JUDGMENT FOR INTERVENING CLAIMANTS.

   On information by the United States against a cattle company for forfeiture of cattle for unlawful importation, wherein individuals intervened and claimed the cattle or their value, judgment that the interveners recover from the cattle company possession of the cattle, and, if they were not delivered, recover a sum per head, the value as assessed for each head not delivered, *held* proper.

Appeal from the District Court of the United States for the El Paso Division of the Western District of Texas; William R. Smith, Judge.

Information against the Morris Land & Cattle Company for for-

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

feiture of cattle, wherein J. J. Kilpatrick, Jr., and others, appeared and filed answer to the information, claiming the cattle, or, in lieu thereof, recovery of an appraised value from the company. From a judgment for the interveners, the Cattle Company appeals. Affirmed.

Ed. M. Whitaker and Peyton J. Edwards, both of El Paso, Tex., for appellant.

Volney M. Brown and R. E. Crawford and W. H. Fryer, Asst. U. S. Attys., all of El Paso, Tex., for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. On January 15, 1916, the district attorney, in behalf of the United States, filed an information praying the forfeiture of 27 head of cattle, which were described and were alleged to have been seized while in a pasture known as the "Kilpatrick pasture," within the collection district of Eagle Pass, on the grounds that said cattle were knowingly and fraudulently imported into the United States from Mexico, without being entered, unladened, and inspected as required by the customs laws of the United States, and without being inspected by the Bureau of Animal Industry of the Department of Agriculture of the United States, as required by law.

On January 15, 1916, there was filed in the court an affidavit of the manager of the Morris Land & Cattle Company (which will be referred to as the appellant), stating that that company was the owner of said cattle and that they were imported into the United States without its knowledge, authority, or consent. On January 22d the appellant filed a petition praying that the marshal be ordered to deliver said cattle to the petitioner upon its executing bond with sureties as provided by statute. In that petition it was averred that no other person or corporation is the owner of said cattle. On January 31st there was filed in the court a stipulation, signed by the attorney for the appellant and by an assistant district attorney, that the valuation of said 27 head of cattle was $407.50.

On February 3d an order was made that the cattle be delivered to the appellant upon its executing a bond to the United States in the sum of $407.50, with two good and sufficient sureties. The bond was given and the cattle were delivered pursuant to the order, and the appellant duly answered the information. Thereafter, and after notice of the information and the seizure had been given by publication in a newspaper, pursuant to an order of the District Judge, the appellees, J. J. Kilpatrick, Jr., and others, appeared and filed an answer to the information. That answer put in issue the averments of the information as to the cattle being imported from Mexico, alleged that they had never been in Mexico, that they were American cattle belonging to the appellees, and were in their pasture when they were seized, denied that the appellant had any interest in them, and prayed that said cattle be awarded to the appellees, or that, in lieu thereof, they have and recover the appraised value of the cattle from the appellant. Thereafter the appellant, by its attorneys, filed in the cause an instrument of which,

omitting the caption and the signatures of the attorneys, the following is a copy:

"Now comes the Morris Land & Cattle Company, and excepts to that part of the answer and plea of intervention of J. J. Kilpatrick and D. D. Kilpatrick and J. J. Kilpatrick, Jr., wherein they ask judgment of the Morris Land & Cattle Company, and asks that same be stricken out and not considered by the court for the following reasons, to wit:

"(1) Because said pleading was filed after the property in controversy in this action had been delivered to Morris Land & Cattle Company under bond filed in this court, and no new libel has ever been filed herein, and no process has ever been served on said Morris Land & Cattle Company, and said Morris Land & Cattle Company has never made any appearance in this cause as to said cross-action or intervention on the part of the said Kilpatricks, and the court has no jurisdiction to render judgment against said Morris Land & Cattle Company on said cross-action, in that said property is no longer in the hands of the officers of this court.

"(2) And now comes Morris Land & Cattle Company, and, not waiving any of its exceptions to the jurisdiction of the court over it as to the cross-action or intervention on the part of J. J., D. D., and J. J. Kilpatrick, Jr., but relying on same, demurs to the allegations of said cross-action, and says that same are insufficient in law to require further answer of it, and of this it prays the judgment of the court.

"For answer herein, if answer be required, but not waiving any of the matters hereinbefore set out, defendant Morris Land & Cattle Company denies all and singular the allegations set out in cross-action of said defendants, and demands strict proof of same."

The above-mentioned exceptions were overruled, and, a jury being waived, the court, after hearing the evidence, found that the animals described in the information were not subject to seizure and forfeiture, and were the property of the appellees, and it was adjudged that the appellees have and recover from the appellant possession of the said cattle and the costs; the judgment providing, if the said 27 head of cattle, or any of them, are not delivered by the appellant pursuant to a writ of possession ordered to be issued, appellees have and recover of the appellant the sum of $15.10 per head, the value thereof as assessed by the court for each head of cattle not delivered. The record does not set out the evidence adduced in the trial court.

[1] What is complained of is the overruling of the exception or motion that that part of the appellees' answer which prayed judgment against the appellant be stricken out. When the above-mentioned exceptions of the appellant were filed, it was represented in the cause by attorneys, whose appearance was general, not special or limited. It took notice of the answer of the appellees by filing the above-mentioned exceptions thereto. It may be assumed that, prior to service of notice or process so requiring, it was not incumbent upon the appellant to take notice of the claim asserted against it by the answer of the appellees. By appearing and pleading to the claim so asserted, it waived the issuance of process thereon. By invoking the court's decision as to the merits of the claim asserted, it abandoned any rights it may have had to refrain from joining issue thereon until notified or required to do so. Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, 37 Sup. Ct. 283, 61 L. Ed. 715, Ann. Cas. 1918C, 1147, 228 Fed. 273, 142 C. C. A. 565; St. Louis & San Francisco Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659.

[2] The appellant now is complaining of the absence of process on a pleading upon which it made issues, which have been decided against it. There no longer is any occasion or necessity of issuing process when the party to be served has appeared and joined in the issue tendered. To issue and serve now the process which the appellant contends was improperly omitted would amount only to giving formal notice of a claim of which it already has taken notice by unsuccessfully contesting it on the merits. A judgment is not to be reversed because of an omission which did not have the effect of depriving the party complaining of any substantial right.

[3] By representing to the court that it was the owner of the cattle seized, and that no other person or corporation owned them, the appellant acquired possession upon giving bond in an amount which it admitted to be the value of the cattle. It remained a party to the cause, represented by attorneys appearing generally therein for it, when it was disclosed to the court that the ownership of the cattle was claimed by others, who were entitled to appear in the proceeding and resist the forfeiture prayed for. The appellant still being a party to the cause and subject to proper orders made therein, upon the court finding that the cattle were not subject to forfeiture and that they belonged to the appellees, there was no legal obstacle to prevent the court ordering the appellant to deliver to the appellees either the cattle or the sum of money which the appellant had agreed was the value of them. The effect of the order was to require a party to the cause, who wrongfully had obtained possession of the property in the court's custody, to restore the property itself or to pay the admitted value of it to another party found to be entitled to it. The fact that the appellant was enabled to get possession of the cattle by giving a bond, with sureties, for its value, did not have the effect of exempting it from such an order. There was no judgment against the sureties on the bond. Nothing in the record indicates that the court was in error in adjudging that the cattle were not subject to forfeiture and that the appellees were entitled to them. This being so, the appellant has no valid ground of complaint against the judgment appealed from, which can be satisfied by paying the sum which it admitted was the value of the cattle in question, and the costs.

This judgment is affirmed.

(256 Fed. 792)

ECONOMY LIGHT & POWER CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1919.)

No. 2525.

1. NAVIGABLE WATERS ⟹22(1)—DAMS—CONTROL BY STATE.
Under Act Sept. 19, 1890, providing that dams or other structures in navigable waters of the United States shall not be built without authority of the Secretary of War, and Act March 3, 1899, § 9 (Comp. St. § 9971), relating to navigable waters wholly within the state, dams or other structures may be built only by joint assent of the national and state governments.

2. NAVIGABLE WATERS ⟹22(1)—DAMS—WATERS LYING WHOLLY WITHIN A STATE—STATUTES—APPLICATION.
Act March 3, 1899, under which dams or other structures may be built in or over navigable streams wholly within a state only by joint assent of the national and state governments, should be construed to refer to navigable capacity and not rigidly restricted to streams floating interstate or foreign commerce at the time of its passage.

3. NAVIGABLE WATERS ⟹3—ORDINANCES AS TO GOVERNMENT OF NORTHWEST TERRITORY.
The purposes of the Ordinance of July 13, 1787, for the government of the Northwest Territory, was to retain forever the free and unrestricted use to the people of the country of any or all waterways then known to be navigable, or waterways that might thereafter be used by the people in the more remote parts of the country for the purposes of commerce.

4. NAVIGABLE WATERS ⟹1(1)—NECESSITY FOR USING.
The fact that shipping methods have dispensed with the necessity for using the carrying places in the Desplaines river does not lessen in any degree the value of the navigable portions of the stream, nor render them not navigable.

5. NAVIGABLE WATERS ⟹1(1)—"NAVIGABILITY."
Navigability does not depend on the amount of tonnage, depth of water, width of stream, character of craft, or relative ease or difficulty of navigation, nor the use at some time for commerce; navigability being determined by natural conditions.

6. NAVIGABLE WATERS ⟹1(6)—DESPLAINES RIVER.
The Desplaines river in Illinois is a navigable stream, and a dam cannot be constructed therein without the consent of the United States government, under Act March 3, 1899, § 9 (Comp. St. § 9971).

7. COURTS ⟹372(1)—DECISIONS OF STATE COURTS—NAVIGABLE WATERS.
A federal court need not follow a decision of the Supreme Court of Illinois as to the navigability of the Desplaines river.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by the United States against the Economy Light & Power Company. From a decree in favor of the plaintiff, defendant appeals. Affirmed.

December 14, 1909, the United States filed its bill of complaint against the Economy Light & Power Company, alleging that said company had, without the consent of Congress and without authority of the Legislature of Illinois, commenced the construction of a dam in the Desplaines river at a point in Grundy county, Ill., and that the portion of the Desplaines river in which the construction of the dam had been commenced was navigable water of the United States, and praying the court to order, adjudge, and

decree said Desplaines river to be a navigable river and one of the navigable waters of the United States; that the portion of the dam constructed be held to be in violation of the provisions of section 9 of the act of March 3, 1899 (30 Stat. 1151, c. 425 [Comp. St. § 9971]), and ordering its removal, and that the defendants and its officers and agents and all persons acting under them be enjoined perpetually from placing any further obstruction in said river, and from doing any other act or performing any other work in connection with the construction of said dam.

On February 28, 1910, the defendant filed its answer, admitting the commencement of the construction of a dam as alleged, but denying the navigability of the portion of the Desplaines river in which said dam was being constructed. A very large amount of evidence was taken, the abstract containing 3,186 printed pages. From a decree entered May 25, 1917, perpetually enjoining the defendant, its officers, agents, etc., as prayed, defendant appeals.

Frank H. Scott, of Chicago, Ill., for appellant.

Charles F. Clyne and Clarence N. Goodwin, both of Chicago, Ill., for appellee.

Before BAKER and EVANS, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). *The Desplaines up to 1894.*—The Chicago-Desplaines-Illinois water route, used from 1673 to 1825 by explorers and in the fur trade, was made up of portions of the Chicago and Desplaines rivers, now some eight miles apart. It includes the Chicago river from its mouth on Lake Michigan to Robey street, Chicago, on the West fork of the South branch, thence westerly, by water or portage, to Mud Lake, about two miles, thence to the Desplaines near Riverside, two miles, down the river to the Illinois, made by the confluence of the Desplaines and Kankakee. The part of this route between the Chicago and Desplaines is called the Chicago divide. The Desplaines river rises near the county line between Racine and Kenosha counties, Wis., and runs in a southerly direction, parallel substantially to the west shore of Lake Michigan, through Lake and Cook counties, Ill., until it reaches Riverside, some 11 miles from the mouth of the Chicago river; thence it takes a southerly direction through Cook and Will counties to its confluence with the Kankakee river near the east line of Grundy county. The original area of the Desplaines river basin was 1,428 square miles, and with the changes which have been made the present area is taken at 1,392 square miles. The Desplaines river basin is usually divided into the upper Desplaines and the lower Desplaines; the term upper Desplaines applying to that portion above Riverside. The upper Desplaines basin has an area of 633 square miles, a general length of about 60 miles, and a general width of about 10 miles, and is a true basin—has practically no true tributary basins, except Salt creek, which has about 110 miles, entering at Riverside. It is a rolling country, originally covered with one-half to one-third in timber. Its general declivity by its flood plane is about 1½ feet per mile. The river bed is cut as a groove in a prairie, rather than the ordinary river bed, with an overflow or flood plane on either side. Originally it had a considerable quantity of swamp, marsh, and bog at headwaters, and in Lake county and in portions of Cook county and also upon Salt creek in Du Page county,

and a lake development in Lake county, from which that county derives its name.

The characteristics of the Lower Desplaines basin, that portion below Lyons or Riverside, are that it covers by the general course of the valley about 42 miles to the confluence with the Kankakee, and has a total descent of about 102 or 103 feet. It has a true subbasin in the Du Page river, which covers 366 square miles. The total area is 795 square miles below Riverside, but outside of the Du Page river this area is only 429 miles. The valley in itself is not a characteristic valley, like the Upper Desplaines, but has the appearance of being an old water course or outlet from the Great Lakes, in which the modern stream follows through remnants of an ancient stream of much greater magnitude, a succession of pools and wide expanses, with intermediate channels, which have not yet developed to their proper proportions, connecting these pools and water stretches. The river valley or river has two considerable tributaries aside from the Du Page, in Hickory creek and Jackson creek, but otherwise the drainage is essentially marginal or shore drainage.

Beginning within a mile of the township line between Riverside and Lyons is a long level expanse, known as the 12-mile level, consisting of a succession of water expanses and connecting straits or channels, from 150 feet up to a quarter or an eighth of a mile in width, in places, and with varying depths up to 10 or 15 feet in localities; these water expanses having a mud bottom which seem to be more vegetable deposits than alluvial, and which indicate originally much greater depth, and margined in by a vegetable growth. These expanses were for a long time used as ice fields by the ice interests which had their market in Chicago. Below the 12-mile level is a succession of ponds and shallow connections in the rock, like Goose Lake and Round Lake, and others between Romeo and the 12-mile level. This whole stretch is well described in the original land survey as a succession of swamps, ponds, lakes, and marshes connected by currents.

Below Romeo, which is 6 miles below Lyons, there is a declivity at the rate of 7 feet per mile from the Romeo highway down to the head of Lake Joliet, a distance of 11 miles, pretty uniformly distributed. Thence for a distance of about 13 miles, between that and the mouth of the river, there are some 10 miles occupied by pools, or Lake Joliet, which has a length of nearly 6 miles and has a width of 500 to 900 feet, and a depth originally up to 15 or 20 feet, and then a pool of over a mile in length immediately below Treat's Island rapids; then Lake Du Page, some 13 miles in length, with a width of about 350 feet on the average, and with a depth of 10 feet and upwards, these pools being connected by intermediate rapids like the one at Treat's Island and the one near the mouth of the Kankakee, and the reach of swifter and shallower water between the pool below Treat's Island and the head of Lake Du Page. These distances are given only approximately, and to show some of the characteristics of the stream. This description applies to the Desplaines river as it was known up to about 1894, when the Sanitary District works changed the conditions very radically through the valley above the city of Joliet, between there and Lyons

or Riverside. The proportion of the Desplaines river itself from the end of the portage road to its mouth, or confluence with the Kankakee, that would consist of pools, would be about 60 per cent. The total distance from the portage road to the confluence with the Kankakee is about 44.5 miles. In that distance there would be the so-called 12 mile level, which is 13.7 miles, Lake Joliet, the pool below Treat's Island, and Lake Du Page, aggregating 10 miles, and Goose Lake and Round Lake, and some other stretches unnamed, amounting in all to about 27 or 28 miles, out of a total of 44.5. The distance from dam No. 1 to the mouth of the river is 15.72 miles, of which about 10 miles consists of pools. This stretch is now more particularly in question. The condition of these pools, if the Desplaines river were to run dry, that is, no water pass from pool to pool, would be that Lake Joliet would be practically available for boats as before; the depth in it being from 20 to 25 feet at the maximum, and a large proportion of it having more than 10 feet.

The distance from Lake Michigan to the mouth of the Desplaines river is 58.32 miles, made up as follows:

From Lake Michigan to Ashland avenue, which is substantially at the forks of the South Branch of the Chicago river.....	5.5	miles
Ashland avenue to Ogden dam, which is across the old portage slough, on the range line, range 12, 13, north of Summit.....	8.3	
The so-called 12-mile level, actual length.....	13.7	
From 12-mile level to Isle la Cache.....	6.7	
Isle la Cache to dam No. 1.....	8.4	
Dam No. 1 to head of Lake Joliet.....	3.	
Head of Lake Joliet to mouth of Desplaines river.....	12.72	
	58.32	

A gauge record kept at Riverside for a period of 20 years, from the year 1886 to 1904, both inclusive, showed the water stood at above 18 feet on the Riverside gauge an average of 4.3 days per year; at or above 13.8 feet an average of 47.6 days per year; at or above 13 feet an average of 73.2 days per year; at an elevation of 12.4 feet an average of 116.2 days per year; at or above 11.85 feet an average of 190.65 days per year.

When the water stood at 10.5 at the head of the 12-mile level at Summit, corresponding to 13 feet on the Riverside gauge, and a volume of 600 second feet, the water in the portage swamp and channels connecting with the Desplaines river would be flowing over to the Chicago river to the extent of the capacity of the trench that existed below this level. During the 20-year period referred to water would have flowed over the Chicago divide on an average of 73.2 days per year.

At all elevations when the water at Summit stood at 11.73 or above, corresponding to an elevation of 13.8 on the Riverside gauge, and to a volume of 1,052 second feet, a boat drawing 15 inches of water could pass from the Desplaines river across the Mud Lake region and over the continental divide and into the Chicago river without making any portage between them. Such condition would have prevailed during the 20-year period an average of 47.6 days per year.

At an elevation between 13.8 feet and 13 feet, the water would

gradually diminish in depth on the Chicago divide, and when a portage became first necessary it would be about 1 mile in length, and when it reached the level of 10.5 it would be 2 miles in length between the West fork at Western avenue, Chicago, and the beginning of deep water in Mud Lake.

At an elevation between 13 feet and 12.4 feet on the Riverside gauge, boats could no longer pass between Mud Lake and the Desplaines river, except light, and be entirely stopped, and a portage of 1 or 2 miles would be required between Mud Lake and the Desplaines river, in addition to the portage of 2 miles between the West fork and Mud Lake. In this condition there would be a substantial navigable depth of 15 inches between Isle la Cache and Mount Juliet, a distance of 11 miles. Isle la Cache is located in the Desplaines river on the township line between the towns of Du Page and Lockport.

At an elevation between 12.4 feet and 11.85 feet on the Riverside gauge, the Chicago divide would require the two portages mentioned, or the alternative of a 7-mile portage between the waters of the Chicago river and the Desplaines. The Desplaines would have a navigable depth of 12 to 15 inches, with possibly some deficiency in one or two localities; from Romeo down to the head of Lake Joliet there would be sufficient water for a boat at the higher stages to go down partially loaded, and at the lower stages to go down light, but at the lower stages the cargo itself would require a transfer over the 11 miles from Isle la Cache to Mount Juliet. All the river below Lake Joliet would be navigated by discharging the cargo in part or wholly at Treat's Island, and near the mouth of the river.

There has been no time when the Desplaines river ran absolutely dry, and there was not any water passing from pool to pool, except as it was artificially produced by the abstraction of water from the Desplaines either for canal purposes during the time in which the Desplaines was used in that connection as a feeder, or through the cutting down of the Chicago divide and the draining of the water towards Chicago at medium and low stages.

Changes in Desplaines River.—Various changes have been made in the Desplaines river from its condition as it existed in a state of nature. The portage swamp region lying east of the range line at Summit has been drained and made tributary to the Chicago river, except so much as is tributary to the canal; this area amounting to 48 square miles. There has been added from the Sag region an area of about 12 square miles, making the change below Lemont 36 square miles to be deducted from the former areas. The deficiency of rainfall, averaging 2.9 inches per year during the period of 20 years from 1887 to 1910, computed from the Riverside gauge, would produce a deficiency in run-off of probably 15 or 20 per cent., and the effect of that would be to diminish both the volume and duration for the stages of water exhibited in the table referred to. There is also a deficiency in the run-off, due to the substantial clearing away of the forest-covered area of 5 per cent. There are changes which have affected the distribution of the run-off. The clearing away of the forests has destroyed an element of control, which has diminished the control and the duration of the stages of water; and in addition the restriction of ponds and lakes

and the drainage of wet lands, bogs, and marshes, and particularly the destruction of a special control existing in the portage swamp region and 12-mile level, all of which under natural conditions prolong the stages of water.

There have been radical changes in reference to the depletion of the water in the Desplaines river from a state of nature. The first change of significance was due to the construction of the Illinois and Michigan Canal in 1848. The effect of the construction of that canal upon the water in the lower Desplaines was a reduction of the drainage of the river below the dams at Joliet to less than 250 square miles out of a total of 1,428 square miles. Further interference arose from the fact that the location of the canal along the south and east side of the valley caused the hill drainage to be turned in part toward Chicago, and on the tangent between Summit and Bridgeport (in the southwestern part of Chicago) it ran across the south arm of Mud Lake, cutting off the drainage and reservoir control of that portion of the portage swamp region lying to the south of the canal. From 1866 to 1871 the Illinois and Michigan Canal was deepened, causing interference with the flow of the river. Further interference was caused by the construction of ditches in the Mud Lake region, and by the erection of pumping works at Bridgeport in 1883. Interference also occurred by reason of the construction of the river diversion by the Sanitary District in 1893–94, by which the Desplaines river was shifted to the west and north side of the valley, so as to leave a site between the river as thus changed and the Illinois and Michigan Canal for the construction of the drainage canal itself. Interference has also been caused by inhabitation which has cut away forests, thus curtailing the run-off, and there has been drainage of swamps and wet lands, and the destruction of ponds and lakes. The Sanitary and Ship Canal, which was completed in 1892, joins the Desplaines at dam No. 1, 31.6 miles from Riverside, from which point its waters flow into and increase the current of the Desplaines.

These various changes have materially interfered with the flow of the river, and the conditions in the basin itself have been changed by the actual distribution of the flow. The Desplaines river has an impermeable soil bottom, and the control that was exercised was surface control largely. The destruction of this surface control has affected the flow of the water much more radically than would have been the case had the ground been permeable.

Use of Desplaines River.—From the latter part of the seventeenth century through the first third of the nineteenth century men engaged in the fur trade passed up and down the Chicago and Desplaines rivers in canoes and flatboats very regularly. Fourteen specific instances of the use of the Desplaines down to the year 1830 are shown in the evidence, as follows: Trips to Chicago: Joliet and Marquette, 1673; Perrault, 1783; Joutel, 1688; Hubbard, 1819; Ebenezer Child, 1821; Tonty, 1680; La Salle, 1681; Fonda, 1825. Trips from Chicago: Father Membre, 1682; St. Cosme, 1698; Hubbard, 1818; Marquette, 1674; Howard, 1790; Furman, 1830. Very many other trips made during the same period, not so well authenticated, are disclosed in the

evidence, and numerous historical references to the Chicago-Illinois route. No doubt other instances of its use may properly be inferred. It was employed by the American Fur Company down to 1825, and then abandoned for other routes. The trial judge found, as the record shows, that there is no evidence of actual navigation within the memory of living men, and therefore there would be no present interference with navigation by the building of the proposed dam. But it was held that the evidence shows the Desplaines a navigable water of the United States, preserved as such by the legislation of Congress.

In the early days the fur trade was a leading branch of commerce in the Western world, and this trade was one of the characteristics of the Desplaines river. Large quantities of supplies of various kinds needed by the settlers in a new country were also transported over the Desplaines during the same period in boats of the size and character then commonly used in river commerce; this transportation being carried on between Chicago, St. Louis, and other points. Canoes of several tons burden were used; some were 35 feet long by 6 feet wide, some 33 feet long by 4½ feet wide, worked by paddles and occasionally a sail, and had a crew of eight men, carrying as much as 6,000 pounds of freight as well as 1,000 pounds of provisions. The pirogues were manned by six or seven oars; the bateaux were larger than the pirogues; the Durham boats were heavy freight craft, 60 feet long, 8 feet wide, 2 feet deep, with a capacity of 15 tons, drawing 20 inches of water.

Commerce of this character existed until about the year 1825. After that year the fur trade, having receded to interior portions of Illinois, was reached more generally by horses. After the year 1848, when the Illinois and Michigan Canal was constructed, commerce that had formerly been carried on the Desplaines river was carried on the canal. Radical changes had taken place in the condition of the river as heretofore shown, which resulted in a diminution of the flow in the river, and this was one of the causes for the nonuse of the river.

Up to 1889 several dams had been built across the Desplaines river, to wit: Daggett's Mill, one half mile below Lockport; dam No. 1, 10 feet high, belonging to the state, Joliet; dam No. 2, 8 feet high, one-half mile below dam No. 1, also belonging to the state; Adams dam, 6 feet high, and less than a half mile below dam No. 2. Formerly a dam existed at the foot of Lake Joliet, at Treat's Island, and also one at the foot of Lake Du Page. These have long been abandoned. There are at the present time no dams in the Desplaines between dam No. 1 and the mouth of the river. Some of these dams were constructed as early as the year 1835, and their existence in the river was a source of obstruction to the commerce that had formerly been carried on. There are also a considerable number of bridges of various kinds across the river.

Is the river navigable within the Act of 1899? The main question in the case is whether the evidence shows the Desplaines a navigable stream of the United States, or one capable of bearing interstate commerce via the Illinois and Mississippi, at the time of the passage of the acts of 1890 and 1899. If the river be decided navigable in fact,

though not used for navigation, the further question is whether the words "navigable river, or other navigable water of the United States," includes a stream of navigable capacity, but not actually used in transportation for the past 75 years. In other words, does the act of 1899 refer only to streams then actually used for interstate commerce, or as well to rivers formerly navigated, like the Wisconsin, Rock, and hundreds of other streams of perfect navigable capacity, but whose use long ago ceased as an instrument of commerce (except for water powers)?

[1] The act of 1890 (Act Sept. 19, 1890, c. 907, § 7, 26 Stat. 454) provides that dams or other structures in navigable waters of the United States shall not be built without authority of the Secretary of War, and the act of 1899 that when such navigable waters are wholly within a state, such structures may be built under authority of the state Legislature if the plans are submitted to and approved by the Chief of Engineers and the Secretary of War. Under this legislation it has been established that dams or other structures may be built only by joint assent of the national and state governments. The effect of the act of 1899, "reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such authority, obtain also the assent of the state acting by its constituted agencies." Cummings v. Chicago, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525, approved in Gring v. Ives, 222 U. S. 370, 32 Sup. Ct. 167, 56 L. Ed. 235; Simpson v. Shepard, 230 U. S. 352, 408, 33 Sup. Ct. 729, 57 L. Ed. 1511, 1543, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Montgomery v. Portland, 190 U. S. 89, 23 Sup. Ct. 735, 47 L. Ed. 965. See, also, Cobb v. Lincoln Park, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264, 95 Am. St. Rep. 258.

It is argued that the act of 1899 was passed under the constitutional power to regulate interstate commerce, and as no such commerce on the Desplaines then existed the statute can have no application, and that if the statute be construed to reach beyond this it was to that extent beyond the legislative power Even so it might be sustained under the war power. We have lately had a significant reminder of the inadequacy of railroad transportation in a time of stress.

[2] But, however this may be, we think streams of actual navigable capacity, but not now used for interstate commerce, are within congressional power to preserve for purposes of future transportation, and that the act of 1899 applies to such streams. If this is not the proper construction, very few interstate streams are within its terms. The Wisconsin river, that great water route of early times between the St. Lawrence and the Mississippi, could be destroyed if the state permitted. The Rock river in Wisconsin and Illinois, a stream in its natural state completely navigable from Lake Koshkonong to the Mississippi,

would be under no government protection, however important for future need. It might be covered with business blocks in cities lying upon it, as was permitted by the Wisconsin Supreme Court in State v. Carpenter, 68 Wis. 165, 31 N. W. 730, 60 Am. Rep. 848. Hundreds of like streams, immensely important to the future welfare of the country, on this theory could never come within the reach of congressional power, except possibly through restoration by the states. We are unwilling to assent to this narrow view of the purpose of the act of 1899, and think it should be construed to refer to navigable capacity (which is the test of navigable water), and not rigidly restricted to streams floating interstate or foreign commerce at the time of its passage. The question has never been decided by the Supreme Court or other federal tribunal.

The disposition of this case upon these facts may therefore well be narrowed down to the question: Was the Desplaines river navigable in its natural condition?

[3] The purpose of the provision referred to in the Ordinance of 1787 was not to declare or make the Desplaines river, or other waterways within the ceded territory, navigable waters of the United States, but only to define rights which depend on its existence. Illinois v. Economy Light & Power Co., 234 U. S. 497, 523, 34 Sup. Ct. 933, 58 L. Ed. 1429. A further purpose was to retain forever the free and unrestricted use to the people of the country of any and all waterways then known to be navigable, or waterways that might thereafter be used by the people in the more remote parts of the country, for the purposes of commerce. In respect to waterways no additional power was granted by the ordinance to the newly created territory, either at the time of the cession or in 1818, when Illinois was admitted to the Union, over the power held by the original 13 states, and the United States relinquished or lost none of its original power and control over the specific things included within its jurisdiction, one of the most important of which was the waterways.

The purpose of the Ordinance of 1787 is clearly stated by the court in The Montello, 20 Wall. 430, 444 (22 L. Ed. 391):

> "To preserve the natural character of all the rivers leading into the Mississippi and St. Lawrence, and to prevent a monopoly of their waters, was the purpose of the Ordinance of 1787 declaring them to be free to the public."

It is immaterial to inquire whether the ordinance is still in force, or was superseded by the Illinois Enabling Act, or the act of admission, because the same principle is preserved in those statutes, and in the Illinois Constitution. It is very evident that from the earliest days the intention of Congress has been to retain in the public for all time the right to the use of streams of navigable capacity. Act Cong. May 18, 1796, c. 29, 1 Stat. 464, entitled "An act providing for the sale of lands of the United States in the territory northwest of the river Ohio, and above the mouth of the Kentucky river," provides in section 9:

> "And be it further enacted that all navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be and remain public highways." (Comp. St. § 4018.)

Act Cong. March 26, 1804, c. 35, 2 Stat. 279, entitled "An act making provision for the disposal of public lands in the Indiana Territory, and for other purposes," provides in section 6:

"That all navigable rivers, creeks and waters, within the Indiana Territory, shall be deemed to be and remain public highways."

[4] The contention of counsel for appellant that the carrying places between the streams cannot be held to be within the intent of Congress in preserving the right to the use of navigable streams, is not material in this case, for the reason that in the progress and improvement in the means and methods of transporting commerce those carrying places have become unnecessary. The fur trader of the early days had but one way to make his trip from Chicago to St. Louis; the waterways and the carrying places between. But the fact that changing methods have dispensed with the necessity for using the carrying places does not lessen in any degree the value of the navigable portions of the streams. It is also to be noted that the statutes of 1796 and 1804 referred to do not mention carrying places, but only refer to the waterways. If the carrying places were deemed of equal importance with the waterways they would undoubtedly have been mentioned in these acts.

In the leading case of The Montello, 87 U. S. (20 Wall.) 430, at page 441, 22 L. Ed. 391, the court said:

"And, independently of the Ordinance of 1787, declaring the 'navigable waters' leading into the Mississippi and St. Lawrence to be 'common highways,' the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

"It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said ([Rowe v. Granite Bridge Corp. (Mass.)] 21 Pick. 344), 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.' * * * But the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand bars."

In Miller v. Mayor of New York, 109 U. S. 385, at page 395, 3 Sup. Ct. 228, at page 234, 27 L. Ed. 971, the court said:

"The power vested in Congress to regulate commerce with foreign nations and among the several states includes the control of the navigable wa-

ters of the United States so far as may be necessary to insure their free navigation, and by 'navigable waters' are meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the states"—citing The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999.

In The Daniel Ball, 10 Wall. 557, at page 563, 19 L. Ed. 999, the court said:

"Those rivers must be regarded as * * * navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, * * * when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

In St. Anthony Falls Water Power Co. v. Board of Commissioners, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497, the Mississippi river at and above St. Anthony Falls, Minneapolis, was held navigable. The court say:

"In order to be navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream."

[5, 6] Navigability does not depend on the amount of tonnage, depth of water, width of the stream, nor the use at some time for commerce. Navigability is determined by natural conditions. Gaston v. Mace, 33 W. Va. 14, 10 S. E. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848. Neither character of craft nor relative ease or difficulty of navigation are tests of navigability. State v. Pacific Guano Co., 22 S. C. 50. "The test of navigability is navigable capacity without regard to the character of the craft, the business done, the ease of navigation, the surroundings of the stream." Heyward v. Farmers Mining Co., 42 S. C. 139, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702. In Stratton v. Currier, 81 Mo. 497, the court held as correct an instruction that, the stream being of sufficient capacity to float logs, the public had a right to its use for that purpose. So in this case, the Desplaines river having the capacity to carry interstate and foreign commerce, the public has the right to its use. In Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209, the court holds that navigability consists in the capacity for valuable floatage. This case also holds that the Ordinance of 1787 supersedes the common-law doctrine of the necessity of usage or custom to establish a public right. In Burroughs v. Whitwam, 59 Mich. 279, 26 N. W. 491, the court held that the Ordinance of 1787 was intended to apply to such streams as were then common highways for canoes or bateaux in the commerce between the northwestern wilderness and the settled portions of the United States and foreign countries, and to such rivers not then in use as would by law be embraced in the definition of navigable waters. In Ten Eyck v. Town of Warwick, 75 Hun, 562, at page 566, 27 N. Y. Supp. 536, at page 539, the court follows the reasoning in many of the cases cited, and says:

"That is, streams must be capable, in their natural condition, of floating commodities to market"—citing and quoting Morgan v. King, 35 N. Y. 461, 91 Am. Dec. 58.

In the latter case the court said:

"The true rule is that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines, or of the tillage of the soil upon its banks. * * * Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous, or, in other words, that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement."

In Wadsworth, Adm'r, v. Smith, 11 Me. 278, 26 Am. Dec. 525, it is held:

"Those [streams] which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right."

In Brown v. Chadbourne, 31 Me. 11, at page 22, 50 Am. Dec. 641, the court said:

"A distinguishing criterion consists in the fitness to answer the wants of those, whose business require its use. Its perfect adaptation to such use may not exist at all times, although the right to it may continue, and be exercised whenever an opportunity occurs. In many rivers, where the tide ebbs and flows, the public are deprived of their use for navigation during the reflux of their waters. A way, over which one has a right to pass, may be periodically covered with water. In high northern latitudes, most fresh water rivers are frozen over during several months of the year."

The statement, "A way, over which one has a right to pass, may be periodically covered with water," gives rise to the suggestion that a river in the latitude of the Desplaines is ordinarily frozen over during some of the winter months, and in a new country, where the roads, if any, are very poor and inadequate, such a river would afford an excellent highway, at least in many places, for teams drawing sleighs. In Lewis v. Coffey County, 77 Ala. 190, at page 193 (54 Am. Rep. 55), the court said:

"We do not understand that, to constitute a navigable stream, it is requisite there shall be sufficient water for the common uses of trade and commerce during all seasons of the year. It must, however, as the results of natural causes, be capable of valuable floatage periodically during the year, and so continue long enough at each period to make it susceptible of beneficial use to the public."

The same doctrine is announced in Morrison Bros. & Co. v. Coleman, 87 Ala. 655, 6 South. 374, 5 L. R. A. 384. In Little Rock, etc., R. R. v. Brooks, 43 Am. Rep. 277 (39 Ark. 403), the court, after discussing the question of what constitutes navigable capacity, says:

"The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If in its natural state, without artificial im-

provements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then, in the American sense, it is navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort, and advance the prosperity of the community."

See Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584.

In East Hoquiam Boom & Logging Co. v. Neeson et al., 20 Wash 142, 54 Pac. 1001, the court holds it to be well settled that a stream which can only be made navigable or floatable by artificial means is not a public highway, citing a number of cases. In Kamm v. Normand, 50 Or. 9, 91 Pac. 448, 11 L. R. A. (N. S.) 290, 126 Am. St. Rep. 698, the court, after an extensive review of the authorities, holds that a stream to be navigable or floatable for sawlogs must be capable in its natural condition at ordinary recurring freshets of being successfully and profitably used for that purpose.

Under these authorities it seems clear that the Desplaines river, having been used as an interstate highway of commerce from 1673 to 1825 in the only kind of commerce then existing, is to be deemed of navigable capacity and a navigable stream within the Ordinance of 1787 and the acts of Congress of May 18, 1796 and March 26, 1804, by which Congress specifically took jurisdiction over navigable streams and declared that they should forever remain public highways. The river is a continuous stretch of water from Riverside to its mouth, and although there is a rapid, and in places shallow water, with boulders and obstructions, yet these things do not affect its navigable capacity. The same may be said of the upper part of the Illinois river above the head of steamboat navigation. We have no hesitation in deciding that both streams are navigable and are within the act of 1899.

[7] The only hesitation we have had in this case is on account of the decision of the Supreme Court of Illinois in People v. Economy Light & Power Co., 241 Ill. 290, 89 N. E. 760. The difference in the records in the two cases would not, perhaps, warrant a different conclusion, although the evidence here is somewhat stronger in favor of navigability than in that case. Taking, as we do, a different view as to the force and effect of the historical accounts of the early use of the river, and being clear that it is in fact a navigable stream, we feel that we should follow our own views.

Decree affirmed.

(256 Fed. 805)

COLDWELL v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. March 27, 1919.)

No. 1360.

1. CRIMINAL LAW ⟹1144(16)—REVIEW—PRESUMPTION—ABSENCE OF EVIDENCE.
Where the evidence on which the jury returned verdict of guilty has not been reported, the Circuit Court of Appeals must accept the verdict as fully sustained by the evidence, if the allegations in the indictment were sufficient in law to sustain it.

2. WAR ⟹4—ESPIONAGE ACT—INDICTMENT.
Facts set out in indictment charging defendant with willfully attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, etc., *held* to constitute a violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c).

3. WAR ⟹4—ESPIONAGE ACT—ATTEMPT TO CAUSE INSUBORDINATION—CIRCUMSTANCES.
The time and place when and where statements charged to have been violative of Espionage Act (Comp. St. 1918, § 10212a et seq.), were made by defendant, and all the surrounding circumstances, should be considered by the jury in reaching a conclusion as to whether their utterance constituted the attempt charged to cause insubordination in the military service of the United States, as well as defendant's intent in making them.

4. ARMY AND NAVY ⟹40—ESPIONAGE ACT—OBSTRUCTION OF RECRUITING.
Indictment charging defendant with willfully obstructing the recruiting and enlistment service of the United States, by making certain statements in addressing a public meeting, in violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), *held* sufficient.

5. WAR ⟹4—ESPIONAGE ACT—INCITEMENT OF INSUBORDINATION.
The language of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense willfully to attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, or willfully to obstruct the recruiting or enlistment service, is broad enough to include statements calculated to produce such results when made in presence of persons not in the military or naval forces, providing they are willfully made and with the intent specified.

6. WAR ⟹4—ESPIONAGE ACT—INCITEMENT OF INSUBORDINATION IN MILITARY SERVICE—OBSTRUCTION OF RECRUITING—QUESTIONS FOR JURY.
Whether defendant's statements in addressing a public meeting, not consisting of soldiers and sailors, under the circumstances constituted an attempt to cause insubordination, etc., in the military and naval forces of the United States, or obstruction of the recruiting or enlistment service of the country, in violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), were questions for the jury.

7. WAR ⟹4—ESPIONAGE ACT—INCITEMENT OF INSUBORDINATION, ETC.—INDICTMENT.
An indictment charging defendant with violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), in that his speech to a public meeting was made with intent to cause insubordination, disloyalty, etc., in the military and naval forces of the United States, etc., *held* not insufficient, as not alleging that defendant's utterances caused any injury to the military or naval service and to the United States.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

8. WAR ⟹4—ESPIONAGE ACT—INCITEMENT OF INSUBORDINATION, ETC.—INSTRUCTION.

In a prosecution for violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), instructions submitting the questions of the likelihood of defendant's utterances to produce insubordination or refusal of duty in the military service, or obstruction of the recruiting and enlistment service, and the intent with which they were made, *held* proper.

9. CRIMINAL LAW ⟹371(1)—ESPIONAGE ACT—INCITEMENT OF INSUBORDINATION, ETC.—EVIDENCE.

In prosecution for violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), by inciting insubordination in the military service and obstructing recruiting, circulars distributed by defendant before passage of act, urging that persons to whose hands they might come should fail to register under the Draft Act, etc., also prior statements in regard to conscription made by defendant, *held* admissible to show intent with which defendant made statements on which his prosecution was based, though he had been indicted for the offense of distributing the circulars.

In Error to the District Court of the United States for the District Court of Rhode Island; Arthur L. Brown, Judge.

Joseph M. Coldwell was convicted of violating the Espionage Act, and he brings error. Affirmed.

Anthony V. Pettine, of Providence, R. I. (Luigi de Pasquale, of Providence, R. I., on the brief), for plaintiff in error.

Harvey A. Baker, U. S. Atty., of Providence, R. I.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. Joseph M. Coldwell, the defendant below, was indicted and convicted in the District Court of Rhode Island, under title 1, § 3, of the act of Congress approved June 15, 1917, c. 30, 40 Stat. 219, known as the Espionage Act (Comp. St. 1918, § 10212c), which is as follows:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

The indictment contained eight counts and he was tried on the first four. He was charged in two counts with willfully attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, and in two other counts with willfully obstructing the recruiting and enlistment service of the United States, by making the following statements in addressing a public meeting held in the People's Forum at Providence, R. I., on the 13th day of January, 1918, the United States being then at war with the Imperial German Government, in the presence and hearing of 500 persons to the grand jurors unknown:

"Dunn, Yanyar, and Hiller, who are to serve 20 years in the Atlanta penitentiary, are victims of a damnable system of government, for which those who support it are directly responsible."

"Law is of no avail now. It sleeps in America during the war. Dunn, Yanyar, and Hiller are guilty of no crimes. They merely refused to become uniformed murderers."

In a long parenthesis, in the way of innuendo, it was set out in each count that John T. Dunn, Theodore Hiller, and Adolph Fred Yanyar, residents of Rhode Island, were on the 5th day of June, 1917, between the ages of 21 and 30, both inclusive, and required by law to register under the provisions of Act May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, §§ 2019a, 2019b, 2044a–2044k), the proclamation of the President, and regulations issued by the President thereunder, and became members of the United States army by virtue of the provisions of the act of May 18, 1917, and the regulations issued thereunder by the President; that they refused to serve as soldiers in the United States army, and were tried for desertion from the service of the United States, before a general court-martial of the United States army, and convicted and sentenced to be dishonorably discharged from the service and to forfeit all pay and allowances due and to become due, and to be confined at hard labor at such place as the reviewing authority might direct, for 20 years; and that the sentence of said court-martial was duly approved, and the United States penitentiary at Atlanta, Ga., designated as the place of confinement. The necessary intent was alleged in each count.

To each of the counts in the indictment the defendant filed a demurrer, assigning in each the following grounds:

First. That the facts therein set forth are not in violation of section 3 of the Espionage Act, so called.

Second. That it does not appear in said count that the divers persons whom the said defendant is alleged to have addressed were persons in the military or naval forces of the United States.

Third. That it does not appear in said count that the alleged utterances of the said defendant caused any injury to the military or naval service and to the United States.

Fourth. That said count of said indictment does not set out facts which constitute any offense against the laws of the United States.

Fifth. That said count of said indictment charges no offense known to the law.

The demurrers were overruled, and at the trial a motion to quash the indictment for the causes assigned in the demurrers was filed, which was denied. At the close of the testimony the defendant moved the direction of a verdict of acquittal for the following reasons:

That the government had failed to show any facts in violation of section 3 of the Espionage Act, so called, or that any person addressed by the said defendant was in the military or naval service of the United States, or that the alleged utterances of the said defendant caused any injury to the military or naval service or to the United States, or that the alleged utterances were made with the intent charged in the indictment; that there was a variance between the proof and the allegations in the indictment, in that the indictment alleged that the

utterances were made "in addressing a public meeting in said Providence, at which said meeting a large number of persons, to wit, five hundred, were present whose names are to the grand jurors unknown," whereas, in truth and as a matter of fact, the government proved that the persons were actually known to the grand jurors.

This motion was denied, and the defendant, having been found guilty by the jury on the first four counts in the indictment, was sentenced to serve a term of imprisonment of three years at hard labor in the United States penitentiary at Atlanta, Ga., on each count, said terms to run concurrently.

[1] The defendant seasonably excepted to the overruling of his demurrers, the denial of his motions, and the admission of evidence relating to the circulation by him of certain circulars prior to the passage of the Espionage Act, and these rulings are assigned as error. No error is assigned because of any instructions given in the charge of the presiding judge to the jury, and at its close counsel for the plaintiff in error said he was perfectly satisfied with it. The evidence upon which the jury returned their verdict of guilty has not been reported. The court submitted to them the determination of whether the words were spoken substantially as alleged, and, if so, whether they were adapted to create the offenses charged, and also the intent with which they were uttered; and we must accept the verdict of the jury in favor of the government on these issues as fully sustained by the evidence, provided the allegations in the indictment were sufficient in law to sustain it.

[2] The first ground of demurrer is that the facts set forth do not constitute a violation of section 3 of the Espionage Act. This act was amended on May 16, 1918, by adding thereto the following:

"Whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States into contempt, scorn, contumely or disrepute." Chapter 75, § 1 (Comp. St. 1918, § 10212c).

It is contended in argument that, as the defendant was charged with uttering the words set out in the indictment, before the passage of this amendment, this is proof that, without it, the alleged utterances would not be penal. The amendment, however, does not relate to the offenses with which the defendant was charged, but to other and distinct offenses, which may be committed by utterances in regard to the form of government of the United States, the military or naval forces or the flag of the United States, or the uniform of the army or navy of the United States, or by language intended to bring the form of government of the United States, the military and naval forces, the flag, or the uniform, into contempt, scorn, contumely, or disrepute.

The system of government to which the alleged statements of the defendant related was plainly the system of raising an army, which

had been provided by the Conscription Act, passed by Congress, and the regulations promulgated by the President by authority of that act. The characterization of that act and these regulations as "a damnable system of government," and of those who had been sentenced because of violation of these regulations as "victims" of such a system, for which those would be responsible who supported it, could be found by the jury, under the circumstances and the intent set out in the indictment, an attempt "to cause insubordination, disloyalty, mutiny or refusal of duty," not only on the part of those who had become, by registration and the regulations which had been prescribed under the Selective Draft Act, members of the military and naval forces of the United States, but also of those who under the act and regulations were required to perform any duty.

It is urged by counsel that, when the defendant said that the three parties named had been guilty of no crime, he had in mind that they had never been inducted into the military service and that they therefore could not possibly be guilty of desertion, or, in other words, that one cannot desert that which he never joined. But in the innuendo it is alleged that they had become members of the United States army by virtue of the provisions of the act of May 18, 1917, and had refused to serve as soldiers in the United States army, and were tried for desertion from that service before a general court-martial, and convicted, and afterwards sentenced, which sentence was duly approved by the proper military officers. The justification of their conduct, as stated by the plaintiff in error, was, not that they had been convicted of an offense which they had not committed, but that "they merely refused to become uniformed murderers." Certainly the use of such language could be interpreted as an attempt to encourage others to imitate their conduct, and an attempt to breed a spirit of rebellion and disobedience to military law, and also to the requirements of the Selective Draft Act, in the mind of one who had already been inducted into the military or naval forces, or of one who had not yet been inducted into the military or naval service, but was liable to be inducted into that service, by causing him to feel that the service into which he had been or might be called was not an honorable one, in defense of high ideals and the protection of the popular institutions to which he owed allegiance, but that when clothed in the uniform of his country he would be driven to commit acts of murder.

[3] The time and place when and where the alleged statements were made by the defendant, and all the surrounding circumstances, could be considered by the jury, and were properly for their consideration, in arriving at a conclusion in regard to whether their utterance constituted the attempt charged as well as the intent of the defendant in making them. The language attributed to the defendant does not call for any legal or expert knowledge in its interpretation, and the jury was as well able to judge of its adaptability to produce the results alleged as the court.

[4] Was the offense of obstructing the recruiting and enlistment service of the United States with willful intent sufficiently charged in these counts? The government had devised an elaborate scheme with

the regulations which had been promulgated for calling into the military service those between the ages of 21 and 30, inclusive.

We have only to consider the effect that might have been produced if any considerable number of men within the draft age had been induced to believe that the system which had been inaugurated was a "damnable" one, and that service in the naval or military forces might make them murderers, to reach the conclusion that the attempt to implant such a feeling in their minds would obstruct the recruiting and enlistment service of the United States. In order to obstruct it is not necessary that enlistment be actually prevented, or that any one be persuaded from complying with any of the provisions of the Conscription Act. The statute forbids the willful creation of any obstruction that makes the enforcement of the recruiting or enlistment laws more difficult, provided the intent to obstruct is present; and it is a sufficient allegation of the offense if language is alleged to have been willfully used by the defendant which was calculated to make enlistment or recruiting more difficult, provided the intent to effect this result is also alleged.

[5, 6] The second ground upon which the several counts in the indictment are alleged to be insufficient is that it does not appear in them that the persons whom the defendant is alleged to have addressed were in the military or naval forces of the United States. The act makes it an offense to willfully "attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States," or to "willfully obstruct the recruiting or enlistment service of the United States," and its language is broad enough to include statements calculated to produce these results, when made in the presence of persons who are not in the military or naval forces of the United States, provided they are willfully made and with the intent set out in the act. Whether the statements alleged to have been made constituted, under the circumstances, an attempt "to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States," or an obstruction of "the recruiting or enlistment service of the United States to the injury of the service or of the United States," were questions for the jury.

[7] It is also urged that the counts were insufficient, because it is not alleged that the utterances with which the defendant was charged "caused any injury to the military or naval service and to the United States."

In United States v. Krafft, 249 Fed. 919, 162 C. C. A. 117, L. R. A. 1918F, 402, in which a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit was denied by the United States Supreme Court, without opinion (247 U. S. 520, 38 Sup. Ct. 582, 62 L. Ed. 1246), it was held that violation of this statute is not dependent upon any one actually being influenced by the language used, and "that all that need be shown is use of language which would be likely to cause mutiny, disloyalty, or insubordination, with intent so to do, and that both the speaking of the words and the intent of the speaker are for the jury."

We think that the allegations in the indictment were sufficient, and that they fully apprised the defendant of the nature of the offense with

which he was charged, and with sufficient definiteness so that, in case of conviction or acquittal he could thereafterwards plead the judgment in any other prosecution for the same offense.

[8] The court properly submitted the question of the likelihood of such utterances to produce insubordination, refusal of duty and causing an obstruction to the recruiting and enlistment service, and the intent with which they were made, to the jury with the following instructions:

"You must be satisfied, gentlemen, that the words are adapted to produce the effect alleged and were used with the intent to produce it. * * *

"It is not necessary that the United States shall prove an attempt to influence any particular person. It is enough for them to satisfy you that an attempt was made to cause persons who should thereafter, during the period of the war, become, by enlistment or by draft, members, as the statute says, in the military and naval forces, to refuse the duty imposed upon them, or to become insubordinate, disloyal, or mutinous."

With these instructions we fully agree, and they are in accord with the interpretation of the statute by other courts.

[9] During the trial the court admitted in evidence certain circulars containing advice not to register, and against conscription. These circulars were alleged to have been distributed by the plaintiff in error during the month of May, 1917. This was the contents of one handed by him to Thomas H. Gardiner:

"Friend of American Freedom:

"You are opposed to the conscription law. You do not want to see a military system forced upon the people of this country against their will. You do not want to be compelled to be a cog in a huge military machine. You do not want to see every young man in this country trained to the point where he has no will power of his own, but simply a tool to obey the orders of his so-called superior officers. The youth of America must not be used for cannon fodder.

"These are just a few of the conditions that will be imposed upon the people of this country. Can you imagine a democracy with conscription? This conscription law is just one more attempt of Wall Street to tighten its grip on the people. A strong military power now means despotism in the near future.

"You can do your share to stop this law from being put into effect if you will act now. This note to you is one of many thousands that are being sent out all over the country. You are one link in an endless chain, and we want you to work with us by following these suggestions.

"1st. Do not register; no matter what your age or physical condition. Registration is the first step toward conscription. You will not be alone in this; thousands are going to refuse. You will make one more in this huge protest against Prussianizing America.

"2d. Have copies of this circular written or printed and send them to every person you can think of.

"3d. Tell every person whom you can trust not to register.

"4th. Do it now as time is short; use the inclosed circulars where they will do the most good.

"Caution.—Do not sign your name to any communication you may send out on this matter, and remember that eternal vigilance is the price of liberty. Get busy."

The other circulars, inclosed in envelopes and sent to other parties through the mail, were of the same general tenor, and urged the persons to whom they were sent to "kill conscription by refusing to register." As these circulars were distributed before the enactment of the

Espionage Act of June 5, 1917, it is claimed that they were inadmissible. The court, however, correctly instructed the jury that they were received in evidence only for the purpose of showing the intent with which the defendant made the statements with which he was charged in the indictment under which he was being tried, and that, whether the defendant could be punished for distributing these circulars urging a violation of a law which had not yet been enacted was not a question before the jury and about which they "need not bother their heads." They were also told to consider that men change their minds, and that, "if there were previous to this period an intent, that there were many circumstances in this case referred to by counsel for the defendant which would have made it unlikely that he should then and there have spoken words with that intent." With this caution he submitted this evidence with the following instructions:

"It is for you to say, gentlemen, whether or not, in your opinion, they are sufficiently close in time and in connection with the meeting of January 13th to indicate any intent of that kind, or whether they aid you in any way in making up your mind as to the existence of the intent on that occasion."

It is also urged by counsel that these circulars were inadmissible for the further reason that the plaintiff in error had been indicted by a federal grand jury for the district of Rhode Island because of their distribution, and that said indictments were then pending against the plaintiff in error; but the circulars were competent to show the intent with which the utterances alleged in this indictment on which he was tried were uttered. They were admitted for this purpose only, and the rights of the defendant were carefully guarded by the instructions which were given in regard to them, and there was no error in their admission nor in that of prior statements in regard to conscription made by the defendant.

As the evidence has not been reported, we are unable to determine whether there was any variance between it and the allegations in the indictment or not; but, if there was such a variance, as stated by the defendant in his motion for an acquittal, it was immaterial.

Since the submission of this case the Supreme Court has, in Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, decided on March 3, 1919, Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566, and Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561, decided on March 10, 1919, given a like construction to the Espionage Act.

We regard those decisions as conclusive on the main questions in this case.

The judgment of the District Court is affirmed.

(256 Fed. 813)

GOLDSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1919. Rehearing Denied March 4, 1919.)

No. 2619.

1. CRIMINAL LAW ⟹304(6)—VENUE—EVIDENCE—JUDICIAL NOTICE.
Where there was evidence that an offense was committed in Rockford, Ill., the court could take judicial notice that it was within the Northern district, Western division, of Illinois, so that the venue was established.

2. INTOXICATING LIQUORS ⟹236(15)—SALE TO SOLDIER—EVIDENCE—UNIFORM.
In prosecution for unlawful sale of liquor to soldiers in uniform, testimony by the purchasers that they were in uniform, and reference to the purchasers as soldiers by other witnesses, who did not know them, is sufficient to warrant the jury in finding that they were in uniform when the purchases were made.

3. CRIMINAL LAW ⟹37—PROSECUTION—ESTOPPEL—PROCURING SALES.
The fact that soldiers who purchased liquor were military police, who made the purchases to procure evidence, does not estop the government from prosecuting the seller, where no deception was practiced upon him, though the soldiers claimed to want the liquor for sickness.

4. CRIMINAL LAW ⟹37—PROSECUTION—ESTOPPEL—DECOYS OR DETECTIVES.
The mere use by the government of decoys or detectives does not raise the issue of estoppel to prosecute, but there must be deception of such character as to make it unconscionable for the government to press its case.

In Error to the District Court of the United States for the Western Division of the Northern District of Illinois.

Abraham Goldstein was convicted of unlawfully selling intoxicating liquor to soldiers in uniform, and he brings error. Affirmed.

Writ of error to review sentence pronounced upon the defendant, who was found guilty upon three counts of an indictment charging him with unlawfully selling intoxicating liquor to soldiers in uniform.

H. J. Rosenberg, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and James R. Glass, both of Chicago, Ill., for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. [1] It is claimed by defendant that the government failed to prove venue. We reject this contention, because it was shown that the offense was committed in Rockford, and inferentially that the Rockford referred to was in the state of Illinois. The court properly took judicial notice of the fact that Rockford, Ill., is in the Northern district, western division, state of Illinois. Hoyt v. Russell, 117 U. S. 401, 6 Sup. Ct. 881, 29 L. Ed. 914.

[2] Defendant also complains because the testimony fails to show that the soldiers were, at the times when whisky was sold them, in the uniform of the military forces of the United States. The soldier W. stated that on February 5th, being one of the dates fixed in the

indictment when liquor was sold to him, he was in full military uniform. On February 8th, another date similarly fixed, he named two men and himself, and was then asked, "All soldiers?" and replied, "All soldiers, and in uniform."

There is other testimony showing that witnesses other than defendant observed "the soldier" about defendant's restaurant. These witnesses were not acquainted with W., but significantly referred to him as "that soldier." Defendant also referred to the soldier K., to whom whisky was delivered, as "the sergeant." Having no acquaintance with K., it would have been unusual for the defendant to call him sergeant, unless his uniform indicated his position. There was testimony in the record to the effect that these men were in the restaurant only when on duty, from all of which we conclude that the jury was justified in finding the soldiers were in uniform when they received the whisky.

[3] Defendant relies chiefly, however, upon the claim that the government is estopped from prosecuting this case, because its officers induced defendant to commit the crime, citing Voves v. United States, 249 Fed. 191, 161 C. C. A. 227. Passing for the moment the government's assertion that no claim of estoppel was ever made in the District Court, to a consideration of the evidence, we are persuaded that no jury question was presented upon this issue.

Three witnesses, soldiers at Camp Grant, testified for the government. They were members of the military police. Their duty was to secure evidence against persons selling whisky to soldiers. From their statement it appears the defendant sold whisky on the 3d, 5th, 8th and 18th of February to one or more of them; that they received this whisky in bottles that bore a grape juice label; that on the last occasion they asked for a larger bottle, adding that they "were putting on a little party." On this occasion the defendant left the restaurant, went to a nearby hotel, where he filled the larger bottle with whisky and brought it back, receiving $1.50 therefor.

But if we are to determine whether any jury question in reference to this issue was presented by the evidence, we may, as we are doubtless required to do, ignore entirely this testimony and confine our attention to the defendant's story.

Defendant testified that one of the soldiers, W., came into the restaurant almost daily, spent considerable time visiting with defendant, and became friendly with him and his family, including the children. During one of these visits he asked for a drink of whisky and was refused. This request was repeated on various occasions, and was always refused. Finally, after defendant had just returned from a trip to Chicago, W. complained of being despondent. To quote defendant's exact language the soldier said:

"If you don't give me some, I don't know what I am going to do with myself."

"You won't find me alive."

"You have got to give me a little to quiet me down."

Whereupon defendant gave him whisky, and W. left a half dollar.

On one of the other occasions defendant stated that one of the soldiers complained of having a headache, while on the last occasion,

the day before the larger bottle was obtained, two of the soldiers brought a note from W., which told of W.'s confinement to his bed and his need of whisky. The next day, the 18th, three of the soldiers were present, and defendant admits that he was told that they desired a larger amount in order to "put on a party." For this larger bottle he received $1.50.

This story discloses no deception on the part of the government officers. Defendant knew he was violating the statute—knew the parties to whom the liquor was sold were soldiers. No excuse whatever is offered for the third and fourth violations; for, if a soldier may absolve the vendor from liability by saying he has a headache, the statute is entirely useless.

[4] Quite different was the Voves Case. There the government not only used a decoy, but selected one whose appearance and dress was such as to deceive the defendant into believing the Indian was one of a Mexican crew working in the neighborhood. More, when the defendant made the announcement that the decoy was a Mexican, the government agents sat by and did not dispute him. In that case the defendant was lured into committing a crime by the government's deception. Upon such circumstances the prosecution was unwarranted.

But something more than the mere use of decoys or detectives by the government is necessary to raise an issue of estoppel. Grimm v. United States, 156 U. S. 604, 610, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode v. United States, 159 U. S. 663, 669, 16 Sup. Ct. 136, 40 L. Ed. 297. There must be deception of such a character as to make it unconscionable for the government to press its case.

In the present action, defendant was suspected of selling liquor to soldiers. The suspicions appeared well founded. Members of the military police were asked to put the defendant to the test. He was tempted, not once by a single soldier, but on several occasions by one soldier, by two soldiers, and by three soldiers. The men dressed as soldiers, known to the defendant as such, asked for whisky, and it was sold them.

We find nothing that required the court to submit to the jury any issue of estoppel.

The judgment is affirmed.

(256 Fed. 816)

HUSTIS v. HERBERT.

(Circuit Court of Appeals, First Circuit. April 5, 1919.)

No. 1364.

1. MASTER AND SERVANT ⟹278(18)—RAILROADS—PREMATURE STARTING OF TRAIN—NEGLIGENCE.

In action for death of employé at a station, evidence *held* insufficient to sustain finding that railroad was negligent in starting the train, although there was a bag on a truck to be loaded on the express car.

2. MASTER AND SERVANT ⟹240(1)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A station employé of a railroad, who lost his footing and fell under the cars, was guilty of negligence in attempting to throw a bag of poultry in the open door of a baggage car traveling at the rate of 7 or 8 miles an hour.

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by H. W. Herbert, as administrator of the goods and estate of John R. Little, against James H. Hustis, as receiver of the Boston & Maine Railroad. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Austin M. Pinkham, of Boston, Mass., for plaintiff in error.

Alexander Murchie, of Concord, N. H. (Hollis & Murchie, of Concord, N. H., on the brief), for defendant in error.

Before BINGHAM and JOHNSON, Circuit Judges, and MORTON, District Judge.

JOHNSON, Circuit Judge. This is a writ of error from a judgment of the District Court of the United States for the District of New Hampshire, in favor of H. W. Herbert, as administrator of the goods and estate of John R. Little, against James H. Hustis, as receiver of the Boston & Maine Railroad.

Little, the deceased, was so severely injured on July 28, 1917, at the station of the railroad company at the village of Pike in the state of New Hampshire, that he died in consequence of his injuries. There was no question about the nature of his employment, although there was some doubt whether he was employed by the railroad company or by the American Express Company. He was employed to do regular station work, including handling baggage, freight, and express, and was paid both by the railroad and by the express company.

The station agent of the railroad company at this station was E. Bertram Pike, who was also employed as agent of the express company. The work at the station was done by a Mr. Aldrich and the deceased, who were paid by Mr. Pike from the revenue of his office. In addition to his duties in handling express, baggage, and freight, the deceased also acted as a telegraph operator for the railroad at the station.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In the view that we have taken of the case it is immaterial whether Little was employed by the railroad company or by the express company.

There was very little work to be done at the station except during the summer months, and on the day when he received his injuries, which was Sunday, he and Aldrich were present at the station awaiting the arrival of the paper train, which arrived about 9:10 a. m. There was a trunk and a bag of poultry upon a truck on the platform in front of the station. The trunk was to be placed in the baggage car and the poultry in the express car. The paper train was made up of an engine, mail car, express car, baggage car, smoker, and one coach, in the order named. Upon the arrival of the train Aldrich pushed the truck up to the rear door of the baggage car, while Little went to the forward door of the express car to receive the express which was to be unloaded at the station. Aldrich got upon the truck and put the trunk into the baggage car, and after he had done this he jumped from the truck and started to draw it up toward the express car. The forward express car door was about 60 or 70 feet from the rear door of the baggage car, into which Aldrich had put the trunk. As Aldrich started forward with the truck on which was the bag of poultry, weighing about 70 pounds, he shouted to Little that he had a bag of poultry to go, and the latter came toward the truck and seized the bag. Aldrich was not certain whether the train had started before Little seized the bag or not; but about that time the train did start, and Aldrich took hold of the bag with Little, and both started toward the open door of the express car, but, finding they could not reach it, the express man told them to put the bag into the rear door of the express car. This they were unable to do, as that door was closed. They then waited for the baggage car to come along. The train was moving upon a down grade and rapidly gained headway, so that its speed was at the rate of 7 or 8 miles an hour when the rear door of the baggage car was opposite them. They then attempted to throw the bag of poultry into this door, but in some way Little lost his footing and fell under the cars and was run over, receiving injuries resulting in his death. Aldrich was unable to testify just how the accident happened; whether Little was thrown up against the car as they attempted to throw the bag into the baggage car, or whether he slipped and fell. No testimony was offered by the railroad company, and at the close of all the testimony the defendant moved that the court direct the jury to return a verdict in its favor, which was denied, and this is assigned as error.

We have carefully examined the testimony, fully realizing that, if there was any evidence or inference which might reasonably be drawn from it to sustain the verdict of the jury, it must be allowed to stand.

The plaintiff in his writ alleged that the defendant—

"carelessly and negligently started its train and baggage and express cars without notice or warning to said plaintiff's intestate before he had finished transferring express from said truck to said express car, thus making it necessary for said plaintiff's intestate to finish loading said car while said train was moving."

There was no testimony to sustain this allegation; but, on the contrary, it was undisputed that the deceased, Little, had taken from the forward door of the express car all the express that was to be delivered at that station; that he had no truck with him at the express door and no express upon the platform to put aboard the express car; that he had finished his work at the express door, and Aldrich had taken the trunk from the truck at the rear door of the baggage car and placed it in that car, and then had started with the truck, with the bag of poultry upon it, toward the express car, and notified the deceased that the bag was to go by express. At about this time the train started. There was no evidence that a signal was given by anybody for its starting, nor any evidence that those in charge of the train had been notified that the bag of poultry was to go by express.

[1] The fact that the bag was upon the truck in front of the station when the train pulled in would not necessarily impart any information or authorize any inference that it was to be put aboard the express car; as it was on the truck with the trunk, which was rolled forward to the baggage car, it might well have been assumed that both the trunk and the bag were baggage; and we do not think that any reasonable inference could be drawn by the jury from the situation that those in charge of the operation of the train knew or had any reasonable ground to believe that the bag was to be loaded into the express car. We think, therefore, there was no evidence to sustain the allegation that the defendant was guilty of negligence in starting the train when it did.

The plaintiff relies upon Ayers v. Boston & Maine R. R., 68 N. H. 208, 39 Atl. 1021; but in that case the plaintiff, assisted by others and the brakeman on the train, was loading cans of milk, and, when all but five cans had been loaded, the train was started without any signal from the brakeman and without any notice or warning to the plaintiff. The plaintiff then hurriedly took up three of the cans, walked along the platform opposite the car, and, in attempting to put them into it, was injured. The process of loading was interrupted by the sudden starting of the train, without any warning to the plaintiff, and an emergency was created which justified hurried action by the plaintiff, and there was evidence of negligence in starting the train while the loading of the cans of milk was in process.

In order to recover in the case under consideration, it was necessary to show in the first instance that there was negligence on the part of the railroad. As we do not think this was shown, there was error in denying the motion for a directed verdict.

[2] We think, also, if there had been any evidence which would justify a finding of negligence in the starting of the train, that, under the circumstances disclosed by the evidence, the negligence of the defendant had no causal connection with the injuries received by the deceased, but that they were sustained by him because of his own negligence. He was a man of mature years, and had been employed for three summers, at least, about that station, doing the work of loading and unloading baggage and express.

After it was discovered that the rear door of the express car was

closed, he and Mr. Aldrich waited upon the platform until the rear door of the baggage car was opposite them. Deceased then had a full view of the situation, and the danger must have been obvious to him. He undertook to do a dangerous thing, with a full realization of the whole situation, when he had time for reflection, and the injuries he received were solely the result of his own negligence.

The judgment of the District Court is reversed, the verdict set aside, and the case remanded to that court for further proceedings not inconsistent with this opinion.

(256 Fed. 819)

In re LILIENTHAL.

Appeal and Petition of BOAS.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3225.

1. BANKRUPTCY ⟹387—ATTACHMENT LIENS—EFFECT OF CONFIRMATION OF COMPOSITION.

In view of Bankruptcy Act July 1, 1898, §§ 67c, 67f, 70f (Comp. St. §§ 9651, 9654), confirmation of an offer of composition by bankrupt debtor prior to any adjudication in bankruptcy dissolved liens of attachment placed within four months of the commencement of bankruptcy proceedings, under section 14c (section 9598).

2. BANKRUPTCY ⟹391(3)—RESTRAINING PROCEEDINGS IN STATE COURTS.

The District Court in bankruptcy has jurisdiction to issue an order staying, until adjudication or until dismissal of the petition for adjudication of bankruptcy, proceedings in actions in state courts in which attachment had been placed upon the bankrupt's property within four months prior to commencement of bankruptcy proceedings.

Appeal from, and Petition for Revision of Proceedings in, District Court of the United States for the Southern Division of the Northern District of California; Maurice T. Dooling, Judge.

In the matter of E. R. Lilienthal, bankrupt. From an order of the District Court, denying a motion of Nat Boas to vacate an order staying further proceedings in certain suits in attachment which had been instituted by him in the state court in California, he appeals and petitions to revise. Affirmed.

Appellant petitioner asks reversal of an order of the District Court denying a motion to vacate an order staying further proceedings in certain suits in attachment which had been instituted by him in the state court in California. Appellant is a creditor of the bankrupt, E. R. Lilienthal, and sets forth:

That on September 27, 1917, a petition for adjudication in involuntary bankruptcy was filed against Lilienthal; that on October 13, 1917, petitioner filed his answer to the petition and denied the commission of any act of bankruptcy as alleged; that the issue raised by such petition and answer has never been brought to hearing or decision, and that no adjudication in bankruptcy has been had; that on December 26, 1917, the bankrupt filed a petition for composition with his creditors, and that after proceedings were regularly had thereon, and about June, 1918, the court made its order of confirmation of the offer presented, and that said order of confirmation has never been vacated; that petitioner has not accepted the offer, and has filed no proof of

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claim; that petitioner holds certain security for his claim, in that on August 31, 1917, as plaintiff, he commenced two suits against Lilienthal, now bankrupt, and others, in the state courts, to recover judgments for the amounts due to him, and in each suit caused writs of attachment to issue and levies to be made upon all of the money and effects belonging to Lilienthal and levied upon certain realty; that neither of said actions has been tried; and that on October 24, 1917, the District Court ordered a stay of further proceedings in the actions in the state court "until an adjudication of Lilienthal as a bankrupt, or until the dismissal of the petition for adjudication of bankruptcy herein."

Milton Newmark, of San Francisco, Cal., for appellant and petitioner.

Lilienthal, McKinstry & Raymond, of San Francisco, Cal. (Thomas, Beedy & Lanagan and Charles W. Slack, all of San Francisco, Cal., of counsel), for appellee and respondent.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). Appellant contends that, having placed the attachments within four months of the commencement of bankruptcy proceedings, and no trial upon the issue of bankruptcy having been had, and no adjudication in bankruptcy having been made, the liens of attachment remain valid, and that therefore he is entitled to proceed in the state court to the enforcement thereof; while appellee takes the position that, under the Bankruptcy Act and the amendment, the court having confirmed an offer of composition by the bankrupt debtor, the liens of attachment were discharged.

A composition being one of the methods of procedure open to a bankrupt, he may tender certain sums to his creditors. The sums tendered are regarded as the equivalent of the assets which would be obtained by regularly proceeding according to the more usual bankruptcy methods. Creditors may accept or reject the offer. If they accept, the matter is submitted to the court, and after inquiry into the regularity of the proceedings and whether they are for the best interests of creditors, the effect of the proposed offer upon creditors who have not assented to the offer, and into the good faith of the offer and acceptance, the court may confirm the composition. If it so orders, the status becomes fixed by section 14c of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 550 (Comp. St. § 9598), which provides:

"The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

Prior to the amendment of 1910 (Act June 25, 1910, c. 412, 36 Stat. 838) it was held that a bankrupt before adjudication could not effect a composition with his creditors. But by the act of 1910 he—

"may offer, either before or after adjudication, terms of composition to his creditors. * * * In compositions before adjudication, the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall

preside, and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed." Remington on Bankruptcy, §§ 2354¼, 2354½.

Inasmuch as a confirmation before as well as after adjudication discharges the bankrupt from his debts, other than those not affected by a discharge, it is but reasonable to hold that all liens incident to the debts from which the bankrupt is discharged are also discharged. This view is strengthened by considering section 70f of the Bankruptcy Act (Comp. St. § 9654), which provides that—

"Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him."

It would not be consistent with the right to be reinvested with property that the amount of attachment liens should be considered and provided for in the orders of the court with respect to the composition. It is of common experience that often bankruptcy proceedings are brought because a creditor has sued and levied attachment in the state court. Under such conditions, where voluntary bankruptcy proceedings are begun, if it were the duty of the United States court sitting in bankruptcy, when it hears evidence upon an offer of composition, to deduct the amount of the liens in attachment from the gross value of the assets of the bankrupt, the order of confirmation would not operate to discharge the bankrupt from all debts other than those agreed to be paid by the terms of the composition and those not affected by the discharge. But that the effect of a composition is to restore the estate to the bankrupt free from all his debts provable and dischargeable in bankruptcy, and to distribute among his creditors the amount the bankrupt is required to pay, is well established by the decisions of the courts. Sturges v. Crowninshield, 4 Wheat. 122, 194, 4 L. Ed. 529; Harrison v. Sterry, 5 Cranch, 289, 301, 3 L. Ed. 104; Cumberland Glass Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042; 7 Corpus Juris, p. 346. See, also, Brandenburg on Bankruptcy, § 1233; Black on Bankruptcy, § 660. In Miller v. MacKenzie et al., 13 Nat. B. R. 496, 43 Md. 404, 20 Am. Rep. 111, the Court of Appeals of Maryland held that the operation of an assignment in bankruptcy in reference to an attachment was to arrest all proceedings under it—to dissolve it. In Smith Stebbins & Co. v. B. Engle et al., 4 N. B. R. 481, 44 Iowa, 265, a case very close to the one under consideration, the Supreme Court of Iowa held that the debt of the attaching creditors was extinguished by the composition under the Bankruptcy Act, and that the attachment "of course falls to the ground." Corner v. Mallory, 31 Md. 468.

[1, 2] It being indisputable that under section 67, subdivisions (c) and (f), of the act (Comp. St. § 9651), where there has been adjudication in bankruptcy, a lien of attachment falls, we cannot see that a different result should follow where there may not have been such an adjudication. The statute which gives the right to offer composition has no words which abridge the effect of an order upon statutory attachment liens against the property of the debtor, although he may not have been adjudged a bankrupt, and it is our opinion that, the indebtedness having been discharged by the composition, the attachment liens were dissolved, and that the District Court in bankruptcy has jurisdic-

tion to issue the order made. Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Virginia Iron Co. v. Olcott, 197 Fed. 730, 117 C. C. A. 124.

Affirmed.

(256 Fed. 822)

LOUISIANA AGRICULTURAL CORPORATION v. PELICAN OIL REFINING CO., Inc.*

(Circuit Court of Appeals, Fifth Circuit. April 5, 1919.)

No. 3270.

1. EQUITY ⟹66—MAXIMS—SEEKING AND DOING EQUITY.
   One is not entitled to the aid of a court of equity for the enforcement of any right he may have, unless he is ready and willing to do equity.
2. INJUNCTION ⟹108—CONDITION PRECEDENT—PAYMENT OF DEBT TO DEFENDANT.
   The owner of a capsized vessel, which has gone aground, is not entitled to an injunction to restrain a creditor having a lien on it from saving it, where he has not, by pleading or otherwise, offered to pay the debt owing to the creditor, or to do equity, even though the creditor has no legal right to save the vessel.
3. APPEAL AND ERROR ⟹843(2)—MATTERS REVIEWABLE—MOOT QUESTIONS.
   On appeal from an order granting an injunction, the question of the propriety of the issuance of an injunction will not be reviewed, where the injunction is no longer effective.
4. TRIAL ⟹11(3)—TRANSFER OF CAUSE.
   In a suit for injunction, where plaintiff was denied relief on the ground that he refused to do equity, court should not have dismissed the bill, under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), but should have transferred the cause to the law side of the court, where a state of facts was alleged which, if proved and not rebutted, would entitle the plaintiff to some relief in an action at law.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by the Louisiana Agricultural Corporation against the Pelican Oil Refining Company, Incorporated. From a decree for defendant, plaintiff appeals. Affirmed in part, and reversed and remanded in part, with directions.

Claude L. Johnson and T. M. Miller, both of New Orleans, La., for appellant.

M. M. Boatner and Geo. H. Terriberry, both of New Orleans, La., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This is an appeal from a decree which was adverse to the appellant, Louisiana Agricultural Corporation, the plaintiff in a bill in equity against the appellee, Pelican Oil Refining Company, praying that the latter be enjoined from trespassing upon or questioning or slandering appellant's alleged title and possession of the steam yacht Radha, and for general relief. The averments of the bill showed that the claim of the appellant to the vessel mentioned was

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*Certiorari denied 250 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

based upon an alleged sale to it by Charles Collins Buck, on or about June 21, 1913, of all his rights, title, and interest therein. The bill contained averments to the effect that prior to the just-mentioned sale said vessel was bought by one Stern at a judicial sale under a decree made in a suit to which said Buck was a party, and that Stern executed a conveyance, in blank, of the vessel, which was delivered to Buck's attorney, and that thereupon Buck re-entered into possession and ownership of the vessel. The averments as to Buck acquiring ownership and possession of the vessel were duly put in issue. The evidence adduced showed the following state of facts:

Stern, the purchaser of the vessel at judicial sale, agreed to release or sell it, not to Buck alone, but to Buck and two creditors of his, who held mortgage liens on the vessel, for considerations which included the payment of $400 to Stern. Buck being unable to pay that amount, and the mortgage creditors being unwilling to pay it, with their consent and approval, an arrangement was made with the Metropolitan Bank to pay Stern the $400 upon the delivery to it of a conveyance of the vessel by Stern; there being a blank left in that instrument for the insertion of the name of a grantee. That arrangement was carried out. After that occurred, the vessel capsized in the Mississippi river near its bank in the upper part of the city of New Orleans. From that time until the time of the bringing of this suit it remained there, aground and partly under water. Buck refused to pay the amount owing to the Metropolitan Bank, though often requested to do so. He would not, individually, or as the managing officer of the appellant, agree to a sale of the vessel, though, as stated by a witness for the appellant, it was "going to wreck and ruin." In this situation the Metropolitan Bank, in July, 1917, entered into an agreement with the appellee, by which the latter agreed to attempt to salve the vessel at its own expense, and, if successful, was to have an option for 30 days after the vessel was floated to buy it for $3,000. Under this arrangement, the appellant took charge of the vessel; no one else then being in possession of it. Up to that time it had no notice that the appellant had or asserted any claim to it.

[1, 2] An injunction was prayed for by the appellant as a means of preventing the carrying out by the appellee of its undertaking to salve the vessel. The appellant's prayer for an injunction was denied, and its bill was dismissed without prejudice to any rights it may have in and to the said yacht Radha. It is plain that the transaction with the Metropolitan Bank was intended to secure it for the amount advanced by it. There was evidence indicating that debts other than that one were intended to be secured. By that transaction the bank was enabled to vest title to the vessel in itself, or another, by inserting the name of the grantee in the blank left for that purpose in the conveyance made by Stern. Buck being a party to that transaction, if he reacquired possession, it may be inferred he did so for the bank, or that he held possession subject to its rights. By the appellant's purchase from Buck, it acquired only such rights as he had. It is not entitled to the aid of a court of equity for the enforcement of any right it may have, unless it is ready and willing to do equity. It has not, by pleading or

otherwise, offered to pay the debt owing to the bank. Whether the bank did or did not have the right to salve the vessel itself, or to get another to do so, a court of equity is not called on to help the appellant to prevent this being done, so long as the appellant does not evince a willingness to do equity in the premises. Whether the action of the court in denying the injunction prayed for by the appellant is or is not sustainable on other grounds, it is sustainable on the ground that the appellant was seeking the aid of a court of equity and did not show its readiness or willingness to do equity. The appellant cannot refrain from either rescuing the vessel or paying what is due on it, and, at the same time, be entitled to the aid of a court of equity to prevent the carrying out of an attempt to save the vessel to which a creditor having a claim upon it is a party.

[3] On a cross-bill filed by the appellee, the court ordered the issuance of an injunction restraining the appellant from interfering with the appellee, its agents or servants, its contractors or subcontractors, in the work of raising and salving the said yacht. On the hearing in this court, it was stated, and not denied, that since the decree appealed from was rendered the appellee had raised, salved, and repaired or reconstructed the vessel, and that it is now in use in commerce. This being true, the injunction issued on the cross-bill no longer is effective, and the question of the propriety of its issue and maintenance has become a moot one. So far as that action of the court is concerned, there remains nothing on which the decision of this court can operate, and it need not decide a question that has become purely moot. Wingert v. First National Bank, 223 U. S. 670, 32 Sup. Ct. 391, 56 L. Ed. 605.

[4] The record shows that the appellant alleged a state of facts which, if proved, and not rebutted, entitled it to some relief in an action at law complaining of what the appellee did with the vessel under its contract with the Metropolitan Bank. The situation was such a one as to make equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) applicable. Instead of dismissing appellant's bill, though this was done without prejudice, the court should have ordered that the cause be transferred to the law side, to be there proceeded with, as provided in the rule mentioned.

It follows from the above-stated conclusions that the decree appealed from should be affirmed, except the part of it which ordered the dismissal of the appellant's bill without prejudice, and that that part of the decree should be reversed, and that the cause should be remanded, with direction to transfer it to the law side of the court; and it is so ordered, each of the parties to be taxed with half of the costs.

(256 Fed. 825)

KIRKWOOD v. UNITED STATES.

DENISON v. SAME.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1919. Rehearing Denied June 2, 1919.)

Nos. 5137, 5138.

BRIBERY ⟹11—CONSPIRACY ⟹47—BRIBERY OF UNITED STATES OFFICER—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to sustain a conviction of one of two defendants jointly indicted for bribery of a post office clerk and of conspiracy to commit such offense, but sufficient to sustain the conviction of his codefendant of the former offense.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Criminal prosecution by the United States against Fred Kirkwood and Ernest B. Denison. Judgment of conviction, and defendants separately bring error. Reversed as to defendant Denison, and affirmed as to defendant Kirkwood.

Thad B. Landon, of Kansas City, Mo. (Sherman & Landon, of Kansas City, Mo., and George Link, Jr., of New York City, on the brief), for plaintiff in error Kirkwood.

Thomas Hackney, of Kansas City, Mo., and Rome G. Brown, of Minneapolis, Minn. (Edward J. White, of St. Louis, Mo., and Martin Lyons, of Kansas City, Mo., on the brief), for plaintiff in error Denison.

Elmer B. Silvers, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., and William G. Lynch, Asst. U. S. Atty., both of Kansas City, Mo., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. Fred Kirkwood and Ernest B. Denison were jointly indicted and convicted of promising money to a clerk in a post office to induce him unlawfully to open certain letters passing through the office, and also of conspiring to commit that offense, contrary to sections 37 and 39 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. §§ 10201, 10203]). At the conclusion of the evidence each of them asked a directed verdict of not guilty, which the trial court denied. They prosecuted separate writs of error from this court.

Briefly stated, the facts were these: Oslin M. Jackson and others were indicted in New York for swindling operations. Jackson fled and became a fugitive from justice. The defendant Denison was one of the prosecuting witnesses, and having lost heavily through Jackson's acts interested himself in having him found and brought to justice. The postal authorities in New York and also the state prosecuting officers were or had been making investigations. Denison employed a detective agency in New York to locate Jackson. The

defendant Kirkwood was in the service of that agency. It was believed that relatives of Jackson were corresponding with him under the cover of a brother-in-law who lived at Harrisonville, Missouri, and Kirkwood was furnished with descriptive information and specimens of Jackson's handwriting, and sent there by the agency to investigate. Kirkwood made acquaintance with a post office clerk at Harrisonville and paid him to make tracings of addresses on certain letters passing through the office, so that they could be compared with known writings of Jackson. It was claimed by the government that, this method proving fruitless, Kirkwood, at the instance or with the co-operation of Denison, induced the clerk by a promise of money to open letters in search of the desired information. This was the foundation of the indictment. Either by opening letters or by information obtained in New York and elsewhere, it does not matter which, Jackson was located in Oregon and afterwards arrested.

We think that in the conviction of Denison there was a clear miscarriage of justice; that, considering the character and source of the evidence against him and its value in relation to all that was received at the trial, it should reasonably be said that there was no substantial proof of his guilt. Denison employed and paid the agency for which Kirkwood worked, but there was no evidence whatever, except as presently mentioned, that he otherwise employed Kirkwood, or paid him for his services or expenses, nor evidence that he directed him in his dealings with the post office clerk at Harrisonville, or authorized or knew of any unlawful tampering with the mails. All of the direct evidence upon these matters was that he did not, in any way, have anything to do with the opening of the letters. Denison, who lived in New York, was not at Harrisonville. He dealt with the detective agency in the former city to aid the public authorities in finding Jackson, as under the circumstances he had a lawful right to do. The sole adverse proof was the testimony of a detective of Chicago and his stenographer that in a subsequent conversation in that city Denison admitted connection with the opening of the letters. The stenographer fully discredited herself, and we put her testimony aside without further mention. The credibility of the Chicago detective was impeached by evidence of former officials in Oregon that he gave false testimony under oath and made false statements there, and also by witnesses from Chicago of apparently respectable stations in life and callings that his reputation for truth and veracity where he lived was bad. A thorough examination of the proceedings at the trial has convinced us that the conviction of Denison was due in no small measure to the latitude allowed counsel for the government in the examination of witnesses and the emphasis put upon relatively unimportant matters. Upon the assumption that it was proper to show Denison's animus against Jackson, counsel were allowed to go so far afield that the specific charges in the indictment seemed at times to be out of view. There was a disproportion of collateral matters, the significance of which was unduly magnified.

With the failure of the case against Denison the charge against Kirkwood that he conspired with him also fails. There is left, however, the charge that Kirkwood induced the post office clerk to open

letters by a promise of a money reward. The sentence of Kirkwood was not more than could have been imposed for that single offense. The proof upon this branch of the case is within narrow compass. It consists almost entirely of the testimony of the clerk and Kirkwood, and while the former was uncertain and indefinite in some of his statements we cannot say there was not substantial evidence supporting the verdict. Kirkwood may have suffered somewhat from the effort to convict Denison, but that cannot be entirely avoided in cases of joint indictment, especially when conspiracy is charged. We do not find that in this part of the case error was committed in the admission of evidence or in the instructions as set forth in the assignments of error.

The sentence of Kirkwood is affirmed. The sentence of Denison is reversed.

(256 Fed. 827)

PARKERSON v. BORST.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1919.)

No. 3371.

1. Costs ⟹70—Determination as to Items.
   Until final judgment, incidence of costs is not determinable, and any attempt to adjudicate correctness of items at the instance of one party might be futile, and hence the court need not adjudicate the correctness of items prior to final judgment.
2. Costs ⟹2—Taxable Costs.
   Taxable costs are made so either by statute, rule of court, or order of court in a specific case, or by established usage, equivalent of a rule.
3. Costs ⟹251—Premiums Paid for Appeal Bond.
   There being no statute, rule of court, order of court, or established usage requiring it, a District Judge did not err in disallowing a premium paid for an appeal bond to be taxed as costs.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Louise Stone Borst against Mrs. Camilla Putnam Parkerson, testamentary executrix of the estate of W. S. Parkerson, deceased. From an order disallowing certain items in taxation of costs, the defendant brings error. Affirmed.

Edwin T. Merrick, of New Orleans, La. (Merrick, Gensler & Schwarz, of New Orleans, La., on the brief), for plaintiff in error.

E. J. Bowers, of Gulfport, Miss., and D. B. H. Chaffe, of New Orleans, La., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. Upon a former appeal this case was reversed and remanded to the District Court, to be there transferred from the equity to the law side of the docket for a retrial by a jury. Parkerson v. Borst, 251 Fed. 242, 163 C. C. A. 398. The plaintiff in error was the appellant and the defendant in error the appellee on the

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

former appeal. Since the remand of the case to the District Court there has been no retrial of the case, and no final judgment has been rendered.

[1] The case comes again to this court for the correction of supposed errors in the taxation of the costs of appeal, which were ordered by this court, on the former appeal, to be paid by the appellee. Two items of costs are in question: First, an item of $100, paid by appellant for a premium on the appeal bond upon the former appeal; second, an item of $104.25, paid for the services of a stenographer upon the hearing in the District Court on the motion to dismiss and upon the merits. The assignments of error may present other items, but the two mentioned were the only ones insisted upon either in the brief or in oral argument of the plaintiff in error. The very sufficient reason for not considering any of the items, other than the first-mentioned, is that the record shows that no final judgment has been rendered in the cause, and any assessment of costs of the District Court, save those of the former appeal, is premature. Until final judgment, the incidence of the costs is not determinable, and any attempt to adjudicate the correctness of the items, at the instance of one party, might be futile, since the moving party might not be adjudged, by the final judgment, to pay the costs, and hence would not be interested in their amount or legality. This is the view the District Judge took, and declined to render a judgment final in form for this reason. It will be time enough to hear plaintiff in error's complaint as to this item when, if at all, there is a final judgment in the main cause against her which adjudges her liable for the costs. This applies to all items except the premium paid for the appeal bond, which was disallowed by the District Judge.

[2, 3] Plaintiff in error contends that the amount paid for the premium for the appeal bond on the former appeal should be taxed as a part of the costs of appeal, which were adjudged against appellee on the former appeal. There is no statute or rule of court touching the question. There was no order of the District Court directing the making of a surety bond, or, indeed, any bond. The District Court merely fixed the amount of the appeal bond, which was to operate as a supersedeas, leaving it to the determination of the appellant as to whether any and as to what character of bond she would give. Decisions in admiralty cases are therefore not in point. Taxable costs are made so either by statute, rule of court, or order of court in a specific case, or by established usage, the equivalent of a rule. No one of these methods is relied upon as authority for the taxation of the item contended for in this case. The plaintiff in error contends that the modern method is to give surety bonds, and that the expense of procuring them is a legitimate disbursement of the appellant. The propriety of a rule of court requiring that such items be taxed as part of the costs may be conceded, without affecting this case, in which there was no such rule.

There have been numerous decisions of the District Courts and Courts of Appeals upon this question, and they are not all in harmony. The Supreme Court has not decided the question. The Court of Ap-

peals of the Sixth Circuit, in the case of Lee Injector Mfg. Co. v. Penberthy Injector Co., 109 Fed. 964, 48 C. C. A. 760, held that there was no authority to tax a premium on an appeal bond as part of the taxable costs. In the case of The Gov. Ames, 187 Fed. 41, 48, 109 C. C. A. 94, the Court of Appeals of the First Circuit held that, in the absence of any statute, rule, or order or court, or usage, the amount paid a surety company for executing a stipulation for the discharge of a vessel from a libel was not part of taxable costs. The court in this case distinguished between cases where the security was required to be given by order of court and those where its giving was optional. It distinguished, for that reason, the case of Jacobsen v. Lewis Klondike Expedition Co., 112 Fed. 73, 50 C. C. A. 121 (Court of Appeals of the Ninth Circuit), and The Volund, 181 Fed. 643, 667, 104 C. C. A. 373 (Court of Appeals of the Second Circuit). In the case of The Texas, 226 Fed. 897, 905, 141 C. C. A. 501, 509, the Court of Appeals of the First Circuit said:

"The next question is whether the District Court was correct in refusing to tax as part of the costs the premiums that were paid for the entry of corporate security. The precise point is not whether, in our opinion, modern conditions have made it desirable that such premiums should be taxed as costs, but whether any statute, or any rule or equivalent custom, in the district of Delaware, required or justified the taxation. The clerk rejected the items on the following ground: 'I do not know of any statute that makes such items taxable as disbursements or otherwise, and there is no rule of court or established practice in this district permitting a recovery of such items. I am aware of no decision of the Circuit Court of Appeals for the Third Circuit or of the District Court for this district on this subject.' And the District Court affirmed the clerk's decision. In our opinion the clerk was right in saying that no statute makes such an item taxable. The subject has been sufficiently discussed in the following cases [citing cases]. And we shall only add our approval of the argument that a rule of court, or a practice equivalent thereto, is needed to justify the taxation. But we may also say that we think such a rule or practice has become so desirable that we feel confident the court below will take an early opportunity to conform its procedure in this respect to the custom prevailing in other districts."

The case of Edison v. American Mutoscope Co., 117 Fed. 192, a Circuit Court case, apparently supports the contrary rule. The Circuit Judge, however, bases his opinion upon the fact that the disbursement was one rendered necessary by a rule of practice, and the rule of practice is not set out in the opinion. In this case, the disbursement was not made as a result of any rule of practice, and there is no statute, rule or order or usage, by which it is made a part of the taxable costs of the case. The District Judge properly disallowed the item. The judgment is affirmed and the plaintiff in error taxed with the costs of appeal.

(256 Fed. 830)

FIRST TRUST CO. v. ILLINOIS CENT. R. CO. SAME v. CHICAGO & N. W. RY. CO. SAME v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1919.)

Nos. 5062–5064.

1. CORPORATIONS ⟹376—POWERS—PURCHASE OF OWN STOCK.
   In the absence of statutory or charter restriction, a corporation has inherent power to purchase its own stock.
2. CORPORATIONS ⟹542(1)—PURCHASE OF OWN STOCK—VALIDITY.
   Where a purchase of its own stock by a corporation is made when it is insolvent, or if such transaction renders it insolvent, such purchase is voidable as to existing creditors, and as to subsequent creditors who became such without notice and in reliance on its former solvency, and if notes or bonds are given in exchange for the stock, they will be subordinate to the claims of such creditors, but not to claims of subsequent creditors with notice.

Appeal from the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Suit in equity by the First Trust Company, as trustee, against the Crooked Creek Railroad & Coal Company, in which the Illinois Central Railroad Company, the Chicago & Northwestern Railway Company, and the Northern Pacific Railway Company separately intervened. From the decree for interveners, complainant appealed. Reversed in part (252 Fed. 965, 164 C. C. A. 473), and interveners petition for rehearing. Denied.

F. H. Helsell and Charles A. Helsell, both of Ft. Dodge, Iowa, for petitioner Illinois Cent. R. Co.

James C. Davis, of Chicago, Ill., for other petitioners.

PER CURIAM. The three grounds upon which the appellees in their petition for rehearing insist that their claims are entitled to be paid in priority to the mortgage bonds are:

(1) That the bonds were issued in payment for stock of the corporation at a time when it was insolvent, or at least that the transaction rendered it insolvent, and that for this reason the bonds are to be subordinated to the claims of all creditors, both existing and subsequent.

(2) That the bondholders were in control of the corporation when the claims of the interveners originated, and for that reason the claims should be paid before the bonds.

(3) That there was a diversion of the corporate income, which should have been devoted to the payment of interveners' claims.

We do not think it necessary, as to the second and third grounds, to say anything in addition to what was said in the opinion filed. As to the first ground, in view of a seeming change on the part of counsel for appellees from their former position, that the mortgage in question was ultra vires and absolutely void, to their present position, that the mortgage and bonds, though valid, are subordinate to the claims of creditors, both existing and subsequent, we may add to what was said in the opinion the following:

[1] It is well settled by the decisions of this court that, in the absence of statutory or charter restriction, a corporation has inherent power to purchase its own stock. Burnes v. Burnes, 137 Fed. 781, 70 C. C. A. 357; Sanford v. Bank, 238 Fed. 298, 151 C. C. A. 314. It is not claimed that there is any prohibition in the charter of the Crooked Creek Railroad & Coal Company, and under the decisions of the state of Iowa it would seem clear that there is nothing in the statutes of that state which prohibits such a purchase. Rollins v. Shaver, 80 Iowa, 380, 45 N. W. 1037, 20 Am. St. Rep. 427; Tierney v. Butler, 144 Iowa, 553, 123 N. W. 213.

[2] It is equally well settled that, where the purchase of its own stock by the corporation is made when the company is insolvent, or if such transaction renders it insolvent, such sale is voidable as to existing creditors, and if notes or bonds are given by the corporation in exchange for the purchase of its stock, such notes or bonds will be subordinate to the claims of existing creditors in the distribution of the assets of the corporation.

The foregoing proposition is also true as to subsequent creditors of the corporation, who become such without notice of the purchase of its own stock by the corporation, but relying upon the supposed previous solvency and unimpaired stock. Coleman v. Tepel, 230 Fed. 63, 71, 144 C. C. A. 361; Atlanta & Walworth Ass'n v. Smith, 141 Wis. 377, 123 N. W. 106, 32 L. R. A. (N. S.) 137, 135 Am. St. Rep. 42; M. V. Moore & Co. v. Gilmore, 216 Fed. 99, 132 C. C. A. 343; In re S. P. Smith Lbr. Co. (D. C.) 132 Fed. 618; In re Fechheimer Fishel Co., 212 Fed. 357, 129 C. C. A. 33; Hamor v. Taylor-Rice Co. (C. C.) 84 Fed. 392; Maryland Trust Co. v. Bank, 102 Md. 608, 63 Atl. 70.

But the appellees in the present case do not fall within either of the classes mentioned. At the time when the corporation purchased its stock and issued bonds therefor, all of the debts of the corporation were paid (except, of course, to the bondholders). The interveners are therefore subsequent creditors. But this is not all. The mortgage itself recited:

> "Whereas, it now appears necessary and proper for the purpose of purchasing 1,125 shares of its capital stock from its present shareholders, * * * the railroad company has now resolved to issue * * * bonds."

This mortgage was recorded on the 4th day of January, 1911, and before any of the interveners became creditors. This was notice to all the world of the purchase of its own stock by the corporation. There is no fraud established, and no claim that the corporation made any representations contrary to the recital just quoted from the mortgage.

The distinction between subsequent creditors with notice and subsequent creditors without notice, who have become such relying upon appearances which were in fact false and deceitful, is well recognized in various classes of cases; for example, in suits by creditors to recover against stockholders for balance on stock which had been issued as fully paid, when in fact not fully paid, or on stock which had been issued for property taken at excessive value, or where dividends had

been paid out of capital by a corporation, solvent at the time, but which afterward became bankrupt. N. W. Mut. Life Ins. Co. v. Cotton Exch. Co. (C. C.) 46 Fed. 22, 24; Rickerson Mill Co. v. Farrell Co., 75 Fed. 554, 560, 23 C. C. A. 302; Cunningham v. Holley Co., 121 Fed. 720, 58 C. C. A. 140; State Trust Co. v. Turner, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136; Bank v. Gustin Minerva Mining Co., 42 Minn. 327, 334, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; Hospes v. N. W. Mfg. Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; Downer v. Union Land Co., 113 Minn. 410, 418, 129 N. W. 777; Mackall v. Pocock, 136 Minn. 8, 161 N. W. 228, L. R. A. 1917C, 390.

In the case at bar the interveners were subsequent creditors with notice of the impairment of the capital stock, and for that reason cannot claim priority over the bondholders.

The petition for rehearing is denied.

(256 Fed. 832)

NAPORE v. ROWE et al.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3245.

1. ARMY AND NAVY ⟹20—SELECTIVE SERVICE ACT—EXEMPTION OF NONDECLARANT ALIEN.

A nondeclarant alien resident of the United States is not ineligible to military duty under Selective Service Act May 18, 1917 (Comp. St. 1918, §§ 2044a–2044k), but the facts which bring him within the exempted class must be affirmatively proved by him before his local draft board, to which is given power to hear and determine, subject to review by appeal to a district board, all questions of exemption under the act; a decision of the district board being made final.

2. HABEAS CORPUS ⟹16—SELECTIVE SERVICE ACT—REMEDY OF NONDECLARANT ALIEN.

Ignorance of the law and the facts on the part of a nondeclarant alien, who did not prove affirmatively before his local draft board the facts bringing him within the class exempted from Selective Service Act May 18, 1917 (Comp. St. 1918, §§ 2044a–2044k), so that he has been arrested as a military deserter, is no ground for habeas corpus; the alien's failure to avail himself of the remedies of the act and the rules precluding such relief, for only on showing of denial of fair hearing or abuse of discretion in the local or district draft board may resort be had to the courts.

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Petition for writ of habeas corpus by John Napore against James H. Rowe and others, members of the Local Draft Board of Butte, Mont., John K. O'Rourke, Sheriff of Silver Bow County, Mont., and the United States, a party affected by the decision. From an order that petitioner be discharged from custody, respondents appeal. Judgment reversed, and cause remanded, with instructions to dismiss the writ and remand petitioner to custody.

The appellee filed in the court below a petition for a writ of habeas corpus, alleging that he was not a citizen of the United States and had never

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declared his intention to become such; that on June 5, 1917, he duly registered at Minot, N. D., pursuant to Act Cong. May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, §§ 2044a–2044k); that thereafter he duly appeared before the local board at Minot, and signed an affidavit before the said board, setting forth that he was born in Russia, and had not declared his intention to become a citizen of the United States, together with other proofs required under the rules and regulations; that he received no notice that anything else would be required of him, or that he should keep in touch with said local board; that he remained in Minot for several months thereafter, and then came to Butte, Mont., where he has since resided; that in September, 1918, while at Butte, he was advised that aliens were required to submit questionnaires to their local boards, the same as other registrants; that this was the first information he ever received on the subject; that immediately after receiving it he appeared before the local board of the city of Butte for the purpose of having his questionnaire filled out and sent to the local board for Minot, N. D.; that he was then arrested and certified as a military deserter.

The appellants, in their return to the order to show cause, alleged that the appellee duly registered on June 5, 1917; that on or about December 15, 1917, the local board for Ward county, N. D., mailed to the appellee a questionnaire, which he was required to fill out and submit not later than December 28, 1917; that he failed to return said questionnaire; that he was thereupon certified to the adjutant general for North Dakota for such delinquency; that on May 3, 1918, said adjutant general notified the appellee of his delinquency and ordered him to report; that the appellee failed to report as so ordered, and on May 17, 1918, he was inducted into the military service of the United States; and that he was detained as a deserter from the United States army. Upon the pleadings and the evidence the court ordered that the appellee be discharged from custody.

Edward C. Day, U. S. Atty., of Helena, Mont., James H. Baldwin, Asst. U. S. Atty., of Butte, Mont., Lieut. Col. Grant T. Trent, Judge Advocate, of Washington, D. C., D. M. Kelly, J. Bruce Kremer, Alf. C. Kremer, L. P. Sanders, J. A. Poore, and William Meyer, all of Butte, Mont., for appellants.

L. F. Lorenz and Barta & Barta, all of Butte, Mont., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The petition for the writ is based upon the propositions that an alien, who has not declared his intention to become a citizen of the United States, is not subject to military duty; that the affidavit which the appellee presented to the local board, wherein he set forth that he was a nondeclarant alien, was in itself sufficient to place him in the exempted class; and that therefore the local board in North Dakota had no authority to induct him into military service and certify him as a deserter. The court below was of that opinion, and held that the drafting of a nondeclarant alien was forbidden by law. To that construction of the law we are unable to assent. The Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 80 [Comp. St. 1918, § 2044e]) provides that all male persons within the prescribed ages shall be subject to registration, "and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided." In brief, the act makes persons of the prescribed age subject to draft, unless exempted or excused by the designated authority. It does not follow that a nondeclarant alien is

ineligible to military duty under the act, or that he is automatically exempted from service. The facts which bring him within the exempted class must be affirmatively proved by him before his local board, the tribunal created by the act, to which is given power to hear and determine, subject to review by appeal to a district board, "all questions of exemption under this act," and the decision of the district board is made final. The uniform ruling of the courts has been that, in order to obtain exemption, the intention of the nondeclarant alien must be expressed in the manner prescribed by law. United States v. Finley (D. C.) 245 Fed. 871; United States v. Bell (D. C.) 248 Fed. 995; Summertime v. Local Board, Division No. 10 (D. C.) 248 Fed. 832; Ex parte Blazekovic (D. C.) 248 Fed. 327; Ex parte Tinkoff (D. C.) 254 Fed. 222.

[2] The appellee has not presented to his local board a claim of exemption in accordance with the regulations, nor has he availed himself of the privilege accorded by the regulations of applying to the local board to reopen the case. All that he alleges by way of excuse for disregarding the regulations is in effect that he was ignorant of the law and the facts. Such ignorance is no ground for habeas corpus. The Japanese Immigration Case, 189 U. S. 86, 101;[1] Ex parte Kusweski, 251 Fed. 977; Ex parte Tinkoff, 254 Fed. 222. The appellee's failure to avail himself of the remedies afforded by the act and the rules precludes relief by habeas corpus, for it is only upon a showing of denial of a fair hearing or gross abuse of discretion in the local or district board that resort may be had to the courts. Angelus v. Sullivan, 246 Fed. 54, 158 C. C. A. 280; United States v. Bell (D. C.) 248 Fed. 995; United States v. Heyburn (D. C.) 245 Fed. 360; Ex parte Beales (D. C.) 252 Fed. 177.

The judgment is reversed, and the cause is remanded, with instructions to dismiss the writ and remand the appellee to custody.

(256 Fed. 834)

REINA v. BRACHO et al.

(Circuit Court of Appeals, Fifth Circuit. March 25, 1919.)

No. 3298.

1. PARTITION ⟹19—POSSESSION TO SUSTAIN ACTION.
   Bill for partition or sale for division, even if it can be made the means of trying a disputed title, cannot be maintained, possession not being in any of the parties, but in the government under a claim of right.

2. ACTION ⟹62—DECLARATION OF RIGHTS—PREMATURE ACTION.
   Bill for adjudication of asserted right to a fund is premature, the fund not yet having come into existence, and it not being known whether, if it shall come into existence, claimant will need any relief in addition to that of the tribunal by action of which it will come into existence, and with which claimant has filed a claim for his asserted interest in the fund.

Appeal from the District Court of the United States for the Canal Zone; William H. Jackson, Judge.

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[1] 23 Sup. Ct. 611, 47 L. Ed. 721.

Suit by Tomas Reina against Beatriz Bracho and others. Bill dismissed, and complainant appeals. Affirmed.

Stevens Ganson, of Panama, R. P., and Chauncey P. Fairman, of Cristobal, C. Z., for appellant.

William C. MacIntyre and W. H. Carrington, both of Cristobal, C. Z., Joseph W. Montgomery, U. S. Atty., of New Orleans, La., Frank Feuille, of Ancon, C. Z., and Walter F. Van Dame, of Balboa Heights, C. Z., for appellees.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge. This is an appeal from a decree dismissing a bill in equity filed by the appellant against the appellees, 11 individuals and the Panama Railroad Company, a corporation. The bill prayed the division or partition of described lands, in which the appellant claimed a one-eighteenth interest; that, in case the division or partition of said lands cannot be made without manifest prejudice to the parties interested, said lands be sold and the proceeds thereof be distributed between the parties according to their respective interests; for an accounting of rents and profits; and for general relief.

It was admitted that prior to the filing of the bill the lands mentioned in it had been taken possession of by the United States pursuant to an executive order issued by the President under the authority conferred on him by section 3 of the Panama Canal Act of August 24, 1912, c. 390, 37 Stat. 561 (Comp. St. § 10039), which is as follows:

"The President is authorized to declare by executive order that all land and land under water within the limits of the Canal Zone is necessary for the construction, maintenance, operation, sanitation, or protection of the Panama Canal, and to extinguish, by agreement when advisable, all claims and titles of adverse claimants and occupants. Upon failure to secure by agreement title to any such parcel of land or land under water the adverse claim or occupancy shall be disposed of and title thereto secured in the United States and compensation therefor fixed and paid in the manner provided in the aforesaid treaty with the Republic of Panama, or such modification of such treaty as may hereafter be made."

The bill averred that the lands have been or are about to be expropriated for a public use, and that the plaintiff had joined with others in filing a claim, based upon the asserted interest, with the Joint Commission created pursuant to article 6 of the Panama Canal treaty for the appraisal and settlement of—

"all damages caused to the owners of private lands * * * by reason of the grants contained in this treaty or by reason of the operations of the United States, its agents or employés, or by reason of the construction, maintenance, operation, sanitation and protection of the said canal or of the works of sanitation and protection herein provided for."

[1] The special relief sought is either a partition, or a sale for division of the proceeds, of lands not in the possession of any party to the suit, but in the possession of the United States under a claim of right. So far as such relief as that mentioned is concerned the subject-matter of the suit is not brought within the grasp of the court,

so as to be subject to its orders, the sole possessor of it under a claim of right not being a party to the suit. It affirmatively appears that the appellant is not a cotenant of the party in possession. Even if a bill for partition, or for a sale for division, could be made the means of trying a disputed title (Clark v. Roller, 199 U. S. 541, 26 Sup. Ct. 141, 50 L. Ed. 300), a court could not, in a suit between private parties, render an enforceable decree for the partition or sale of property in the possession of the Government under a claim of right. The granting of such relief requires that the lands to be partitioned or sold be in the possession of a party or parties brought before the court. The absence from the suit of a party whose presence is indispensable to the granting of such relief therein is a sufficient justification of a denial of such relief. Barney v. Baltimore City, 6 Wall. 280, 18 L. Ed. 825; Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69.

[2] The bill does not aver the existence of a state of facts constituting a basis for an adjudication as to an asserted right of the appellant to share in a fund awarded as damages for the taking of the lands by the government or as compensation for their expropriation. It is not shown that any such fund is in existence. On the contrary, it is disclosed that the claim of the appellant based upon the existence of his asserted interest in the lands is pending and undetermined before another tribunal having exclusive jurisdiction to pass upon it. A judicial controversy is premature when it is started before the subject-matter of it has come into existence and before it is known whether, if it shall come into existence, the claimant will need any relief in addition to that given by the tribunal the action of which brings it into existence. It is not yet known whether there will be any fund that could be dealt with by the orders of the court at the instance of the appellant, or that, if there shall be such a fund, there will be any occasion for granting relief to the appellant with reference to it.

The averments of the bill do not show that the appellant is entitled to the relief sought or any part of it.

The decree is affirmed.

(256 Fed. 837)

PANAMA R. CO. v. PIGOTT.

(Circuit Court of Appeals, Fifth Circuit. March 27, 1919.)

No. 3291.

1. APPEAL AND ERROR ⟹966(1)—CONTINUANCE ⟹7—DISCRETION OF COURT—REVIEW.
   Both under Panama law and general principles, motion for continuance is addressed to discretion of trial court, and action thereon is not reviewable, unless abuse of discretion is shown.
2. APPEAL AND ERROR ⟹977(1)—NEW TRIAL ⟹6—DISCRETION OF COURT—REVIEW.
   Both under Panama law and general principles, motion for new trial is addressed to discretion of trial court, and action thereon is not reviewable, unless abuse of discretion is shown.
3. NEGLIGENCE ⟹136(10)—QUESTIONS FOR JURY.
   Refusing directed verdict in personal injury case is proper, where evidence as to negligence and contributory negligence is conflicting.
4. RAILROADS ⟹281(1)—PERSONAL INJURIES—PANAMA LAW.
   Under the Panama laws, a railroad is liable for personal injuries caused by negligence of its employés.

In Error to the District Court of the Canal Zone; William H. Jackson, Judge.

Action by Noel Pigott, a minor, by his guardian ad litem, George Morrell, against the Panama Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank Feuille, of Ancon, C. Z., and Walter F. Van Dame, of Balboa Heights, C. Z., for plaintiff in error.

Stevens Ganson, of Panama, R. P., and Valentine E. Bruno, of Ancon, C. Z., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PARDEE, Circuit Judge. The statement of the case by plaintiff in error is as follows:

"The minor, Noel Pigott, resides with his father, Thomas Pigott, in the city of Colon, republic of Panama. They are British subjects. George Morrell, guardian ad litem of the minor, Noel Pigott, is an American citizen, but resides in the city of Colon, republic of Panama.

"The complaint in this case was filed for the minor, Noel Pigott, by George Morrell, his guardian ad litem, who acted under the order of the District Court of the Canal Zone. The complaint involves a demand for damages against the plaintiff in error in the sum of $50,000, alleged to have accrued to the said minor on account of an injury received by him in being knocked down and run over by one of the freight cars of the plaintiff in error, in the latter's switchyard situated between E street and Broadway in the city of Colon in the republic of Panama, at the Seventh street crossing. The minor lost his left leg as a result of the accident, which occurred on December 4, 1916. The complaint charged the plaintiff in error with negligence in the operation of its train, and the latter filed a general denial, and by way of special answer it alleged that it was not liable under the laws and jurisprudence of the republic of Panama, and further that the injury to the minor, Noel Pigott, was the result of his own negligence.

"The case was tried before a jury on the 15th of February, 1917, in the Cristobal division of the District Court of the Canal Zone, and resulted in a

verdict and judgment in favor of the defendant in error in the sum of $7,-500. The plaintiff in error now brings this case to this court on writ of error, and is asking that the judgment of the trial court be set aside for the reasons stated in the plaintiff in error's assignments of error."

Then follow some 13 assignments of error, complaining of the trial court's refusal to grant a continuance, to grant a new trial, and to direct a verdict for the plaintiff in error; also refusing special instructions requested, and complaining of instructions given to the jury on the merits of the case. We have carefully considered all the assignments of error in the light of the elaborate briefs presented in the case, and conclude that none of the assignments of error present any reversible error.

[1, 2] Motions for continuance and for a new trial, under the Panama law and the general jurisprudence of this court, are questions within the discretion of the trial court, and not reviewable upon appeal, unless abuse of the discretion is shown, and none appears in this case.

[3] The motion for a directed verdict was properly refused, because the evidence in the case as to the negligence of the plaintiff in error and contributory negligence on the part of the minor, Noel Pigott, was conflicting, and not only warranted, but required, a submission of the case to the jury.

[4] The vital questions involved in this case as to the claimed construction of the laws of Panama have been settled in this and the Supreme Court adversely to the contention of the plaintiff in error. See Panama Railroad Co. v. Bosse, 239 Fed. 303, 152 C. C. A. 291; recently affirmed in the Supreme Court at the present term (249 U. S. 41, 39 Sup. Ct. 211, 63 L. Ed. 466); Panama Railroad Co. v. Toppin, 250 Fed. 989, 163 C. C. A. 239; Railroad Co. v. Gladmon, 15 Wall. 401, 21 L. Ed. 114; Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

As we find none of the assignments of error well taken, the judgment of the District Court is affirmed.

(256 Fed. 839)

MAYO, Immigration Com'r, et al. v. UNITED STATES ex rel. JOBIN.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1919.)

No. 3358.

1. HABEAS CORPUS ⟹113(9)—APPEAL—RECORD.
On an appeal from an order on a habeas corpus hearing directing that an alien be released from custody by the Commissioner of Immigration, it cannot properly be said that the overruling of an objection to the admission of testimony by the alien "on the ground that the court had no jurisdiction to receive evidence and inquire into the merits of said cause, without ascertaining whether the alien J. was given a fair trial by the immigration authorities," was error; it not being made to appear that the stated ground of objection existed in fact, the record not disclosing what the evidence was.

2. ALIENS ⟹54—DEPORTATION—CONCLUSIVENESS OF FINDING.
Where an alien was held under an order of deportation, made by a board of special inquiry and affirmed by the Secretary of Labor, order being based upon finding that alien was a person coming to this country for an immoral purpose, findings on habeas corpus proceeding that alien was denied a fair hearing by immigration authorities, and that "she is not of an immoral character and is entitled to admission to the United States," entitled the alien to be released from custody.

3. HABEAS CORPUS ⟹113(12)—MATTERS REVIEWABLE—RECORD.
On appeal from a habeas corpus proceeding, it must be presumed that the findings of the lower court were proper, where the record does not show the contrary.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Habeas corpus proceeding by the United States, on the relation of Madamoiselle Laure Jobin, against John P. Mayo, Commissioner of Immigration, and the United States of America. From an order directing that the relator, an alien, be released from custody by the Commissioner of Immigration, defendants appeal. Affirmed.

Nicholas Callan, Asst. U. S. Atty., of New Orleans, La., for appellants.

Jose A. Morales, of New Orleans, La., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This is an appeal from an order, made on a habeas corpus hearing, directing that the appellee, an alien, be released from custody by the appellant, the Commissioner of Immigration at the port of New Orleans. The writ was issued pursuant to the prayer of a petition, which alleged that the petitioner, the appellee, was deprived of a fair hearing by the board which ordered her deportation after she was detained upon her arrival at New Orleans on a vessel from a Mexican port. The return to the writ set up that the petitioner was held under an order of deportation made by a board of special inquiry and affirmed by the Secretary of Labor; that order being based upon a finding that the appellee was "a person

coming to this country for an immoral purpose." The record discloses that evidence was adduced on the hearing which resulted in the order appealed from. It does not disclose what that evidence was. Some evidence is set out, without being authenticated in any way by the presiding judge. The record does not purport to contain all the evidence adduced on the hearing.

[1-3] The following is all that is shown by the bill of exceptions: The appellant objected to the admission of testimony by the appellee "on the ground that the court had no jurisdiction to receive evidence and inquire into the merits of said cause without ascertaining whether the alien, Laure Sebastine Jobin, was given a fair trial by the immigration authorities; and his honor, the judge, then and there overruled said objection and admitted said testimony. Whereupon counsel for respondent reserved the bill of exceptions to the said ruling of the court." It is not made to appear that the stated ground of objection existed in fact. It follows that it cannot properly be said that the ruling excepted to was erroneous. The opinion rendered by the District Judge shows that he found that the appellee was denied a fair hearing by the immigration authorities, and that she "is not of immoral character and is entitled to admission to the United States." Proper findings to that effect entitled the appellee to be released from custody under the order of deportation. Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; Zadonaite v. Wolf, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218. It is to be presumed that the findings were proper ones, the record not showing the contrary.

Affirmed.

(256 Fed. 840)

In re GEORGE C. BRUNS CO.

BRUNS v. GEORGE BAKER & SONS, Inc., et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2597.

BANKRUPTCY ⟹345—PRIORITY—AGREEMENTS.

Where a president of a bankrupt corporation advanced money to the corporation to enable it to carry through a composition agreement, president stating in a circular letter to the creditors, "To effect the settlement, $2,500 in cash, which is no part of the assets of the corporation, has been put up to guarantee the first payment," the agreement being intended to give to the settlement creditors priority in any liquidation of the assets, the agreed subordination of the rights of such lender to those of other creditors will be enforced.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the George C. Bruns Company, bankrupt. From an order denying the priority of a claim of George C. Bruns over that of George Baker & Sons, Incorporated, Julius Grossman, Incorporated, and Maetrick, Eyre & Co., Incorporated, Bruns appeals. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

James Rosenthal, of Chicago, Ill., for appellant.
Julius Moses, of Chicago, Ill., for appellees.

Before BAKER and MACK, Circuit Judges, and SANBORN, District Judge.

MACK, Circuit Judge. The facts in this case are stated in McKey v. Bruns, 243 Fed. 370, 156 C. C. A. 150, affirming the allowance of Bruns' claim for $2,500 advanced by him on October 30, 1915, to the bankrupt corporation to enable it to carry through a composition agreement of 10 per cent. cash and 40 per cent. in notes, made in a former bankruptcy proceeding. The question of the composition creditors' priority over this claim was not then passed upon; that question is now presented on appeal from an order granting such priority.

Under the settlement agreement, the business was to be conducted under the supervision of a creditors' committee until the notes should be paid, and, in case of default in payment continuing for 15 days, the committee was empowered to take possession of the assets, to dispose of them as it deemed advisable, and, after payment of expenses, to apply the proceeds to the payment of the settlement notes. Only the surplus, if any, was to be paid to the bankrupt.

While this agreement was made with the largest creditors on October 28, 1915, it was not to be effective, either until all creditors had accepted it or until the composition was confirmed by the court. On November 9th all the creditors were requested to execute the agreement; in the circular letter to them, Bruns, as the bankrupt's president, stated that—

"To effect the settlement, $2,500 in cash, which is no part of the assets of the corporation, has been put up to guarantee the first payment."

On December 20th the composition was confirmed.

In our judgment, this agreement was intended to give to the settlement creditors priority in any liquidation of the assets. This priority was not dependent upon a liquidation out of court; the right of the creditors' committee so to proceed, in case of default, was granted merely as an additional means of effectuating the priority. While, as against subsequent bona fide creditors of the company, no lien on the assets was thereby acquired by the settlement creditors, as between them and Bruns, his loan to the company was clearly intended to be a subordinated indebtedness. It was made before the composition agreement became effective, and at a time when the entire assets were applicable to the composition creditors' claims. In effect, it was a not uncommon advance to a corporation for the very purpose of bettering its financial condition, by increasing its assets without correspondingly, as against the composition creditors, increasing its liability.

In Dozier v. Sangamon Loan & Trust Co., 224 Fed. 372, 140 C. C. A. 58, under analogous, though not identical, circumstances, we held that—

"There would seem to be no reason, irrespective of any question of estoppel, for refusing to enforce the agreed subordination of the rights of such a lender to those of other creditors."

Order affirmed.

(256 Fed. 842)

ISENHOUER et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1919.)

No. 5170.

CRIMINAL LAW ⟹423(4)—EVIDENCE—ACTS OF COCONSPIRATOR.

Where a conspiracy has been shown, the act of one conspirator in furtherance of the common purpose is admissible in evidence against all; and this is so, though the conspirator committing the act was not a defendant in the case being tried.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Criminal prosecution by the United States against Clure Isenhouer and others. Judgment of conviction, and defendants bring error. Affirmed.

Roscoe C. Arrington, of Shawnee, Okl. (John L. Arrington, of Shawnee, Okl., on the brief), for plaintiffs in error.

Redmond S. Cole, Asst. U. S. Atty., of Pawnee, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., on the brief), for the United States.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

HOOK, Circuit Judge. The plaintiffs in error were convicted of violating section 6 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. § 10170]), by conspiring among themselves and with others to prevent, hinder, and delay by force the execution of the Selective Draft Act of May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. 1918, §§ 2044a–2044k]). They do not contend here that the evidence at the trial was insufficient to sustain the verdict against them. The only ground for reversal of the sentences is the admission in evidence of certain threatening notes sent to two deputy sheriffs and an assault upon one of them with intent to kill.

There was overwhelming proof of the existence in Oklahoma, including the Western judicial district, where this case arose, of an extensive organization, which the members called the "Working Class Union," an avowed purpose of which was to destroy the established order of society by force of arms, the killing of officials, and the destruction of property by various acts of sabotage. They claimed to have the support of and to be working in concert with the Industrial Workers of the World, commonly called the "I. W. W." Upon the commencement of the war between the United States and the Imperial German government, and the passage of the Selective Draft Act of May 18, 1917, the activities of the organization were revived and directed against the efforts of this government to execute the above statute and to raise its military forces. Numerous overt acts, including revolt and incipient rebellion, occurred. There was substantial proof that the accused were members of a subdivision or local of the larger organization and had knowledge of its criminal purposes.

While the conspiracy was afoot, certain threatening notes were sent

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to two deputy sheriffs, ordering them to leave the country or incur bodily harm. Four were signed "I. W. W.," and the fifth "The Bunch." During the period covered by the sending of the notes, an effort was made in the nighttime to assassinate one of the officers. It is urged that the evidence of the above was inadmissible, because it tended to prove offenses that were separate and distinct from that charged in the indictment. Counsel misconceive the ground upon which it was received. While it was not shown that the accused personally sent the threatening notes or participated in the assault, there was substantial evidence tending to show that the acts were committed by members of the organization to which the accused belonged, and were in aid of and to carry out its unlawful objects. One of the methods of the organization was to impose the will of its members upon the community by threats and physical violence. There was also proof that the acts in question had relation to the common purpose of defeating the observance and enforcement of the provisions of the Draft Act, including the proclamations and regulations in aid thereof. It is an old rule that, when a conspiracy has been shown, the act of one conspirator in furtherance of the common purpose is evidence against all; and this is so, though the conspirator committing the act was not a defendant in the case being tried. Clune v. United States, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269.

The sentences are affirmed.

(256 Fed. 843)

THE RANCAGUA.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3274.

MARITIME LIENS ⚷25—EXECUTORY CONTRACT—SERVICES.

Act June 23, 1910, § 1 (Comp. St. § 7783), giving maritime liens to persons furnishing certain services to vessels, does not authorize a libel in rem against a vessel for breaching an entirely executory contract to remove her cargo.

Appeal from the District Court of the United States for the Canal Zone; Wm. H. Jackson, Judge.

Libel by the Cristobal-Colon Stevedoring Company against the steamship Rancagua and others. From a decree dismissing the libel, the libelant appeals. Affirmed.

Chauncey P. Fairman, of Cristobal, C. Z., and Henry P. Dart, Jr., of New Orleans, La., for appellant.

Stevens Ganson and Theodore C. Hinckley, both of Panama, R. P., for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. This is an appeal from a decree dismissing a libel in admiralty against the steamship Rancagua and its cargo. The libel alleged that the master of the vessel, in his own be-

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half and as the agent for the charterers, entered into a contract with the libelant, by the terms of which contract the master agreed to pay to the libelant a stated amount per ton for discharging the vessel's cargo of about 8,000 tons of nitrates; that the libelant was ready and willing to perform the contract, but, without fault on its part, was prevented from doing so; and that the master of the vessel, without just cause or complaint, informed the libelant that he had made other arrangements for the discharge of the cargo, and that the libelant's services were no longer needed. What was sought to be recovered was the amount of loss and damage alleged to have been sustained by the libelant in consequence of the alleged breach of the contract mentioned. On the order of the court the vessel was released on the deposit with the clerk of the court of the sum of $1,500 as a bond. The master of the vessel made the deposit with money in his possession belonging to the owner of the vessel, the republic of Chile. The libel was excepted to by the master on the ground that the vessel belonged to the republic of Chile and was not subject to the jurisdiction of the court on the claim asserted.

The libel was not maintainable, whether it was or was not subject to the exception mentioned. The averments of it do not show that the alleged contract was executed in whole or in part. The libel was one in rem, brought against the vessel and its cargo, without any process or prayer for relief against any person as defendant. So long as a contract remains wholly executory, the vessel and cargo are subjected to no lien which can be enforced by a libel in rem. The Keokuk, 9 Wall. 517, 19 L. Ed. 744; Vandewater v. Mills, Claimant, etc., 19 How. 82, 15 L. Ed. 554; Schooner Freeman v. Buckingham, 18 How. 182, 15 L. Ed. 341; The City of Baton Rouge (C. C.) 19 Fed. 461; The Strathnairn (D. C.) 190 Fed. 673; 1 Corpus Juris, 1268. Though the contract was for the libelant's services as a stevedore and was maritime in its nature, performance under it was required to confer a lien enforceable by proceedings in rem against the vessel and cargo, if their ownership was such that they so could be subjected to a lien. Contracting to render such necessary services was not the furnishing of them which, under the statute of June 23, 1910 (36 Stat. 604, c. 373, § 1 [Comp. St. § 7783]), gives the furnisher a maritime lien on the vessel.

The decree dismissing the libel was proper, whether the ground relied on to support that action was or was not a tenable one.

Affirmed.

(256 Fed. 845)

FINLEY v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. January 9, 1919.)

No. 1662.

CRIMINAL LAW ⚷1048—ASSIGNMENTS OF ERROR—NECESSITY OF EXCEPTIONS.
In the Circuit Court of Appeals, an assignment of error will not be considered, unless based on an exception.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge.

Criminal prosecution by the United States against Louise Finley. Judgment of conviction, and defendant brings error. Affirmed.

T. P. Cothran, of Greenville, S. C. (H. P. Burbage, of Greenville, S. C., on the brief), for plaintiff in error.

Frank C. Miller, Sp. Asst. U. S. Atty., of Norfolk, Va. (J. William Thurmond, U. S. Atty., of Edgefield, S. C., and C. G. Wyche, Asst. U. S. Atty., of Greenville, S. C., on the brief), for the United States.

Before PRITCHARD and WOODS, Circuit Judges, and CONNOR, District Judge.

PRITCHARD, Circuit Judge. This was a criminal action, tried in the United States District Court for the Western District of South Carolina. The defendant was charged with violating section 13 of the act of Congress of the 18th day of May, 1917 (40 Stat. 83, c. 15 [Comp. St. 1918, appendix, § 2019b]).

While the plaintiff in error (the defendant in the court below) relies on three assignments of error, it appears from the record that no exception was taken either to the charge of the court, or to the introduction of certain evidence by the government. This court has repeatedly held that it would not consider an assignment of error unless the same was based upon an exception. Beaver v. Taylor, 93 U. S. 46, 55, 23 L. Ed. 797; Prioleau v. United States (4th Circuit) 74 C. C. A. 458, 143 Fed. 320; Hull Co. v. Marquette Cement Mfg. Co., 125 C. C. A. 460, 208 Fed. 260; Copper River & N. W. Ry. v. Reed, 128 C. C. A. 39, 211 Fed. 111; Alwart Bros. Coal Co. v. Royal Colliery Co., 127 C. C. A. 599, 211 Fed. 313. Also, in the case of Robinson & Co. v. Belt, 187 U. S. 41, 50, 23 Sup. Ct. 16, 19, 47 L. Ed. 65, the court said:

> "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases de novo."

However, in passing, we deem it proper to say that, on examining the record as to the points sought to be raised therein, we find nothing that would warrant us in disturbing the judgment of the court

below, had the assignments been based upon exceptions taken in accordance with the rules of this court.

For the reasons stated, the judgment of the lower court is affirmed.

(256 Fed. 846)

THE POWHATAN.

THE TELENA.

(Circuit Court of Appeals, Fourth Circuit. January 7, 1919.)

No. 1657.

COLLISION ⟹39—STEAM VESSELS MEETING—CROSSING SIGNALS.

Decree, holding one of two meeting steamships solely in fault for a collision for crossing and failing to comply with the proper signal of the other for passing port to port, affirmed.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

In Admiralty. Suit by the Merchants' & Miners' Transportation Company against E. D. Goff, with cross-libel, for collision between steamships Powhatan and Telena. Decree against the Powhatan (248 Fed. 786), and her claimant appeals. Affirmed.

H. H. Little, of Norfolk, Va., Daniel H. Hayne, of Baltimore, Md., and John F. Lewis, of Philadelphia, Pa. (Hughes, Little & Seawell and John W. Oast, Jr., all of Norfolk, Va., and Lewis, Adler & Laws, of Philadelphia, Pa., on the brief), for appellant.

Floyd Hughes, of Norfolk, Va., and J. Parker Kirlin, of New York City (Hughes & Vandeventer, of Norfolk, Va., and Kirlin, Woolsey & Hickox, of New York City, on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

PER CURIAM. We have carefully examined the record and deem it unnecessary to add anything to the full and fair discussion of the case in the opinion of the court below, reported under the title of "The Powhatan—The Telena," 248 Fed. 786. The controversy turns wholly on a question of fact, and ample testimony supports the findings and conclusion of the learned district judge.

We are satisfied that the case was correctly decided, and the decree will, accordingly, be affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

(256 Fed. 847)

FOLTZ SMOKELESS FURNACE CO. et al. v. EUREKA SMOKELESS FURNACE CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1919. Rehearing Denied March 4, 1919.)

No. 2637.

1. PATENTS ⟹202(2)—ASSIGNMENT OF APPLICATION—ESTOPPEL.
The assignor of an application for a patent is estopped, as against the assignee, from questioning the validity of a patent, application for which subsequently eventuates in a patent, as to claims within the scope of the original disclosure, though not made in the application as filed.

2. PATENTS ⟹202(1)—ASSIGNMENT.
Where one, who was no novice in the patent business, assigned an application for a patent, no fine line will be drawn in his favor, as against the assignee, between claims as allowed and those originally made upon the description and drawings.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by the Eureka Smokeless Furnace Company against the Foltz Smokeless Furnace Company and Ira W. Foltz. From a decree for plaintiff, defendants appeal. Affirmed.

William R. Rummler, of Chicago, Ill., for appellants.

Max W. Zabel, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. Appellant Foltz made application in March, 1915, for a patent on certain new and useful improvements in furnaces of which he claimed to be the inventor. February 16, 1916, he sold and assigned in writing to appellee corporation (of which he was then a stockholder) his "entire interest for the United States in and to improvements described in my applications for United States patents as follows," enumerating this application, among others. Some time prior to the assignment the Patent Office rejected, on the prior art, all of the claims made. After the assignment, but without further affidavit by Foltz or knowledge on his part, the assignee caused new claims to be filed, which eventuated in the issue July 31, 1917, of patent No. 1,235,516, with 10 claims as therein set forth. The drawings of the original application remained unchanged, and the description as first made was unaltered, save in minor details which are here unimportant.

September, 1917, Foltz organized appellant corporation, of which he was president, treasurer, general manager, and controlling stockholder, and they began the manufacture of furnaces which infringed claims 7, 8, 9, and 10 of the patent. Appellee filed its bill against appellants for injunction and accounting. On the hearing appellants offered testimony to show that Foltz was not the inventor of the thing described in claims 7, 8, 9, and 10 of the patent, and offered in evidence copies of prior art patents, on the theory that they tended to

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establish the invalidity of those claims. On appellee's objection all such evidence was ruled out, on the ground that appellant, as assignor of the application for the patent, was estopped as against his assignee from questioning its validity. Such ruling of the District Court constitutes ground of the appeal from the decree granting the relief prayed.

[1] The general rule of estoppel upon the assignor of a patent to deny its validity as against his assignee is too well established to require more than its statement. We see no reason for relaxation of the rule where the subject-matter of the assignment is a duly filed application, which eventuates in a patent. The rejection by the Patent Office of all the claims occurred in April, 1915, and up to the time of the assignment, nearly a year later, the file wrapper does not show any further proceedings. The application is of value only as it may form the basis for a patent grant thereon. Surely it was contemplated that something was here assigned, and plainly it must have been the right to present further claims under the application; for without claims there would be no patent. The salutary rule of estoppel by deed would be much impaired, if, as applied to assignments of applications for patents, it were held to be inoperative as against claims within the scope of the original disclosure, though not made in the application as filed. The District Judge clearly set forth the rule here applying when he said:

"Foltz assigned to the plaintiff everything which he invented that could be based upon the drawings, specifications, and claims set out in his application."

[2] We find no merit in the contention for appellants that the claims in question are not predicated upon disclosures of the application. The Patent Office manifestly found that they were so grounded, in allowing them without requiring further affidavit of the inventor; and our examination of the original application, and of the claims in question, convinces us that the District Court was right in its conclusion that they are fully disclosed by the specifications and drawings as filed. The assignment by Foltz included five other pending patent applications, and evidently he was no novice in the patent business. He must have contemplated and understood the very usual experience in the Patent Office that claims as originally made might be rejected or changed, and supplemented or abridged, before the final issue of patent. No fine line will be drawn in his favor, as against his assignee, between the claims as allowed upon the assigned application and those originally made upon the same description and drawings.

The decree of the District Court is right, and it is affirmed.

256 Fed. 992)

AUTOPIANO CO. v. OTTO HIGEL CO., Inc.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 142.

PATENTS ⟹328—INFRINGEMENT—NOTE SHEET GUIDE.

A decree holding valid and infringed O'Connor reissue patent, No. 13,-398 (original No. 789,053), for a perforated note sheet guide for player pianos, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Autopiano Company against the Otto Higel Company, Incorporated. Decree for complainant, and defendant appeals. Affirmed.

Otto Munk, of New York City (William F. Hall, of Syracuse, N. Y., of counsel), for appellant.

L. W. Southgate, of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

(255 Fed. 759)

McGREW v. BYRD.*

(Circuit Court of Appeals, Eighth Circuit. January 15, 1919.)

No. 5105.

1. EJECTMENT ⟹9(3)—NECESSITY OF PROVING TITLE.
It is the settled law of Missouri that in an action of ejectment plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's title.

2. EVIDENCE ⟹342—RECORDS—COPY—COMPETENCY.
Under Missouri statutes relating to sale of swamp lands by a county, providing for issuance in triplicate of certificate of purchase by the register, one to be filed by him, that on presentation of a copy to the receiver and payment he should issue a receipt, on which patent should be issued by the county court, a certified copy of a record of a certificate from the books of the register is not admissible to prove title in the purchaser; there being no provision for such record, nor authority to convey title, except on the receiver's receipt.

3. EJECTMENT ⟹109—TRIAL—DIRECTION OF VERDICT.
Where by the laws of the state a patent of land to a deceased person is absolutely void, and there was substantial evidence that the patentee under whom plaintiff claimed was dead when the patent issued, it was error to direct a verdict for plaintiff.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by Abraham R. Byrd against Elias Vincent McGrew. Judgment for plaintiff, and defendant brings error. Reversed.

John T. McKay, of Kennett, Mo., for plaintiff in error.

Robert Burett Oliver, of Cape Girardeau, Mo. (Robert Burett Oliver, Jr., and Allen Laws Oliver, both of Cape Girardeau, Mo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. The defendant in error instituted an action of ejectment against the plaintiff in error for the possession of 160 acres of land, claiming to be the owner thereof. The answer, in addition to a general denial, claimed title to the lands in controversy as a bona fide purchaser by mesne conveyances, under a patent issued by the county of Dunklin, state of Missouri, dated June 22, 1870, to William S. Sugg. There was a trial to a jury, and by direction of the court a verdict for the plaintiff was returned. Proper exceptions were saved to the action of the court in directing a verdict.

As the verdict was by direction of the court, the evidence must be given the strongest probative effect in favor of the unsuccessful party. Evidence was introduced tending to establish the following facts:

It was agreed that Dunklin county was the common source of title; its title emanating from a grant by the United States to the

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied 257 Fed. 66, 168 C. C. A. 278.

state of Missouri, under the Swamp Land Act of Congress of September 28, 1850 (9 Stat. 519, c. 84 [Comp. St. §§ 4958–4960]), and the act of the General Assembly of the state of Missouri, entitled "An act in relation to swamp lands in the counties of New Madrid, Pemiscot, Mississippi, Scott, Cape Girardeau, Stoddard, Wayne, Ripley, Butler and Dunklin," approved March 1, 1855 (Laws Mo. 1855, p. 154), and amendments thereto enacted in 1857 (Laws Mo. 1856–57, p. 271). By the act of 1855 the clerks of the county courts of those counties, in which the swamp lands granted to the state were lying, were made ex officio registers of swamp lands in their respective counties, and the county treasurers ex officio receivers of public moneys arising from the proceeds of the sales of such swamp lands. When any of said lands were sold, the register was to execute triplicate certificates of the sale, one of which he was to deliver to the purchaser, file one in his office, and transmit the other to the state register of lands at Jefferson City. When the certificate of purchase was presented to the receiver of public moneys and the purchase money paid, he was to issue triplicate receipts, one to be given to the purchaser, one filed in his office, and the other to be transmitted to the state register of lands at Jefferson City, whereupon the Governor was to cause a patent for the lands to be issued to the purchaser. In the county of Dunklin and two other counties named in the act, the county clerks and treasurers were not to act as registers and receivers, respectively, but these officials were to be elected by the qualified voters of each county. By the amendatory act of 1857, the county court of Dunklin county, when satisfied that full payment had been made, was authorized to issue the patent to the purchaser, such patent to be recorded, before delivery, in the office of the clerk of the court issuing it, and copies of such records, duly authenticated were to be received as evidence in all courts as fully as deeds duly proven and acknowledged and recorded in conformity with the recording laws of the state.

[1] It is the settled law of the state of Missouri, as in practically all other states, that in an action of ejectment the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's title. Large v. Fisher, 49 Mo. 307; Parker v. Cassingham, 130 Mo. 348, 32 S. W. 487; Creech v. Childers, 156 Mo. 338, 56 S. W. 1106; Carter v. Macy, 239 Mo. loc. cit. 524, 144 S. W. 107; Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780.

[2] To establish his title, the plaintiff introduced a certified copy of a certificate from the register of lands of Dunklin county, dated December 27, 1860, which certified that William Pruett had purchased certain lands described, among which the lands in controversy are included, and had made full payment therefor. It was certified as being a true copy, "as the same appears in Patent Register No. 2, page 20." Objection to the introduction of this certified copy was made by the defendant, and, the objection having been overruled, an exception was saved, and this is assigned as one of the errors.

The plaintiff then introduced in evidence the original patent to William Pruett, executed by the presiding judge of the county court of Dunklin county on August 20, 1867. This patent was recorded,

before delivery in the office of the county clerk, as required by the act of 1857, but was never recorded in the office of the recorder of deeds, as required by the general statute of the state. Objection to the introduction of this deed was made, and, the objection being overruled, an exception was saved. The plaintiff also introduced evidence tending to establish his claim of title by mesne conveyances from the owners of the William Pruett title.

The defendant introduced evidence of a deed by Dunklin county for these lands, to one William S. Sugg, dated June 22, 1870, and a chain of conveyances of that title to him. He also introduced substantial evidence, tending to prove that William Pruett, under whom plaintiff claims, had died some time before the patent was issued to him. The plaintiff, in rebuttal, introduced evidence tending to show that Pruett was living at that time.

The certified copy of the register's certificate of purchase by William Pruett was clearly inadmissible, as there is no statute of the state requiring such a record to be kept. The statute provided that one of the original certificates of purchase was to be kept in the register's office, but no provision is made by this or any other statute of the state of Missouri, to which our attention has been called, requiring such certificates to be recorded in a book or record. Nall v. Conover, 223 Mo. 477, 122 S. W. 1039; Whitman v. Giesing, 224 Mo. 600, 123 S. W. 1052; Chamberlayne on Modern Law of Evidence, § 1693.

Another ground upon which the objection to the introduction of this certificate should have been sustained is that, under the statute, the certificate of the register merely establishes that application for the purchase has been made. The purchase money could only be paid to and received by the receiver. A person may apply to the register to purchase the lands, but until the purchase money had been paid to the receiver, and receipts therefor issued in triplicate, no patent could be issued by the county court. The objection to the introduction of this certified copy of the register's certificate should have been sustained.

[3] Did the court err in directing a verdict for the plaintiff? Under the laws of Missouri, as construed by its Supreme Court, a deed or patent to a deceased person is absolutely void. Collins v. Brannin, 1 Mo. 540; Thomas v. Wyatt, 25 Mo. 24, 69 Am. Dec. 446; Norfleet v. Russell, 64 Mo. 176; Bartlett v. Brown, 121 Mo. 353, 25 S. W. 1108; Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780; Carter v. Macy, 239 Mo. 518, 144 S. W. 107. And this is the rule recognized generally. Galt v. Galloway, 29 U. S. (4 Pet.) 345, 7 L. Ed. 876; McDonald v. Smalley, 31 U. S. (6 Pet.) 261, 8 L. Ed. 391; Galloway v. Finley, 37 U. S. (12 Pet.) 264, 297, 9 L. Ed. 1079; Neal v. Nelson, 117 N. C. 393, 23 S. E. 428, 53 Am. St. Rep. 590. As there was substantial evidence to warrant a finding by the jury that William Pruett the grantee of the plaintiff, and under whom plaintiff claims title, was, at the time the patent was issued by the county court, dead, the court erred in refusing to submit the case to the jury under proper instructions on that issue.

Other errors have been assigned; but, as they may not arise on the next trial, we do not deem it necessary to pass on them.

For the errors indicated, the judgment is reversed, with directions to grant a new trial.

(255 Fed. 508)

INTERSTATE COMPRESS CO. v. AGNEW.*

(Circuit Court of Appeals, Eighth Circuit. January 15, 1919.)

No. 5012.

1. BAILMENT ⟹14(1)—BAILEE FOR HIRE—MEASURE OF LIABILITY.
   A bailee for hire is only bound to use ordinary diligence in the care of the property bailed, and in the absence of a statute prohibiting it, may limit his liability by contract, except for gross negligence, willful act, or fraud.

2. COURTS ⟹372(4)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.
   A decision by the highest court of a state, not based on any statute, that a contract is void as against the public policy of the state, is not binding on a federal court in a case involving a similar contract, made before such decision was rendered, and where the contract is valid under the settled law of the national courts.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by J. W. Agnew against the Interstate Compress Company. Judgment for plaintiff, and defendant brings error. Reversed.

James R. Keaton, of Oklahoma City, Okl. (Frank Wells and David I. Johnston, both of Oklahoma City, Okl., on the brief), for plaintiff in error.

Everett Petry, of Tulsa, Okl., for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. The defendant in error, hereinafter referred to as the plaintiff, instituted this action against the plaintiff in error, hereinafter referred to as the Compress Company, to recover the value of 294 bales of cotton stored with the Compress Company, alleged to have been destroyed by fire by reason of the gross negligence of the Compress Company.

The answer admits the destruction of the cotton while stored in its compress, but denies all allegations of negligence. As a further defense it pleads that, when the cotton was delivered to it, it executed and delivered to the party delivering it a receipt which provided:

> "Not responsible for loss by damage, fire, flood, or other agencies, unless caused by the willful act or gross negligence of this company"

—which receipt was accepted by the bailor, and that no part of the cotton was destroyed by its willful act or gross negligence. These receipts were issued and delivered in January, 1915. There was a trial

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied 256 Fed. 655, 168 C. C. A. 49.

to a jury, and a verdict for the plaintiff. The Compress Company requested the court, among other special requests, to charge the jury:

"The court instructs the jury that the following provisions contained in each of the receipts issued by the defendant to the plaintiff, or his grantors, for each of the bales of cotton delivered by plaintiff to defendant, and in the latter's possession at the time of the fire, to wit: 'Not responsible for loss by damage, fire, flood, or other agencies, unless caused by the willful act or gross negligence of this company'—constitutes a part of the contract of bailment, and is a valid and binding provision thereof, and before plaintiff will be entitled to recover in this case he must show to your satisfaction by a preponderance of the evidence that defendant's agents or employés were guilty of some act or omission contributing to the destruction of plaintiff's cotton by the fire in question, which was willfully performed or omitted, or which amounts to gross negligence or fraud."

"You are instructed that the defendant in this case, in any event, was only bound to use ordinary care in providing a reasonably safe place for the storage of the cotton, and was bound only to take such precautions and adopt such safeguards as an ordinarily prudent person would adopt to protect his own property."

"The court instructs the jury that one who undertakes to care for or to provide custody for goods for hire has a legal right to limit his liability by special contract, so as to cover only such damage as may be caused by the willful or gross negligence of the party in caring for said property or providing storage therefor."

"The court instructs the jury that a custodian for hire, who has limited the liability thereunder to only such damages as may be caused by the willful or gross negligence of such person, can only be held liable for such damage as naturally resulted from the willful act of such person in caring for said property or for such damage as has resulted from the gross negligence of such person in taking care of said property while in his possession"

—all of which requests were by the court refused and proper exceptions saved.

The court in its charge instructed the jury on this issue:

"A proposition which may well be disposed of at the outset is that the provision in the tickets for this cotton against responsibility, unless caused by the willful act or gross negligence of the company is not valid, because contrary to the public policy of this state. The principle which applies in a case of this kind and which governs in this case is that the defendant, being a bailee for hire of plaintiff's cotton, would become answerable in damages to the plaintiff in case of the loss of the cotton, through its negligence proximately causing such loss, but not otherwise."

To this part of the charge a proper exception was saved by the Compress Company.

[1] The issues are therefore narrowed to the single proposition of law, whether the provision contained in the receipts and accepted by the plaintiff, that the Compress Company is not responsible for loss or damage by fire, flood, or other agencies, unless caused by the willful act or gross negligence of the defendant, is valid. In Clark v. United States, 95 U. S. 539, 542 (24 L. Ed. 518), it was held:

"A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the general law, on the subject."

It is equally well settled that a bailee, in the absence of a statute prohibiting it, may limit his liability by contract, except for gross negligence, willful act, or fraud. World's Columbian Exposition v. Re-

public of France, 96 Fed. 687, 694, 38 C. C. A. 483; Gashweiler v. Wabash, etc., R. R., 83 Mo. 112, 53 Am. Rep. 558; Butler v. Greene, 49 Neb. 280, 68 N. W. 496; Sanchez v. Blumberg (Tex. Civ. App.) 176 S. W. 904; Evans v. Nail, 1 Ga. App. 42, 57 S. E. 1020; Direct Nav. Co. v. Davidson, 32 Tex. Civ. App. 492, 74 S. W. 790; Memphis & Charleston R. R. Co. v. Jones, 39 Tenn. (2 Head) 517; 4 Elliott on Contracts, § 3002; 6 Corp. Juris, p. 1112. In the World's Columbian Exposition Case it was held:

"Is there good reason why the notice given by the Exposition Company to exhibitors, that it would 'in no way be responsible for damages or loss of any kind, * * * however originating,' should not be given full effect according to its terms? We perceive none."

[2] The learned trial judge considered himself concluded by the decision of the Supreme Court of Oklahoma in Inland Compress Co. v. Simmons, 159 Pac. 262, where the court said:

"The writers on bailments seem to agree that the parties to a bailment contract may regulate the responsibilities of the bailee by special contract."

But he further held that a contract by a compress company, identical with that in the instant case, "is against the public policy of the state and therefore void." This opinion was filed July 11, 1916. It will be noticed that the decision in that case is not based on any statute of the state, but on a general proposition of law, declaring for the first time in the judicial history of the state that such a contract is against the public policy of the state. The only statute of the state cited in the opinion is section 1109 of the Revised Statutes of 1910, which provides:

"A bailee for hire must use at least ordinary care for the preservation of the thing bailed"

—which is merely declaratory of the common law and the general law on the subject, as was held in Clark v. United States, supra. Is that decision, rendered long after the contract involved was made, conclusive on the national courts? When a ruling of the highest court of a state is controlling, when the same question arises in an action pending in a national court of that state, has been determined by the national Supreme Court so frequently, that it has ceased to be an open question. Like most important legal principles, it has been of gradual growth, until it has finally become a well-established rule of law. In Kuhn v. Fairmont Coal Co., 215 U. S. 349, 360, 30 Sup. Ct. 140, 143 (54 L. Ed. 228), the court, after a full review of the former rulings of that court on the subject, epitomizes the law as follows:

"We take it, then, that it is no longer to be questioned that the federal courts in determining cases before them are to be guided by the following rules: (1) When administering state laws and determining rights accruing under those laws, the jurisdiction of the federal court is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the state courts. (2) Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state. (3) But where the law of the state has not been thus settled, it is not only the

right, but the duty, of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. (4) So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt."

Applying these rules, giving full weight to that part of the decision in the Kuhn Case that, "for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court, if the question is balanced with doubt," we are of the opinion that the law is well settled that the contract of bailment in the case at bar is valid, and not against public policy, so far as it affects contracts entered into prior to the decision in the Inland Compress Co. Case, and that the court erred in refusing to give the instructions hereinbefore set out, asked by the defendant, and charging the jury "that the limitation of liability in the warehouse receipts was invalid, because contrary to the public policy of the state."

The cause is reversed, with directions to grant a new trial and proceed in conformity with this opinion.

(255 Fed. 242)

SAMPLINER v. MOTION PICTURE PATENTS CO. et al.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 13.

1. TRIAL ⟹177—EFFECT OF MOTIONS BY BOTH PARTIES FOR DIRECTION OF VERDICT—FINDING OF FACTS.

   Motions by both parties for a directed verdict are equivalent to a request for a finding of facts by the court, and both are concluded on the facts so found by direction of a verdict for one of them.

2. CHAMPERTY AND MAINTENANCE ⟹6(1)—PURCHASE OF CLAIM BY ATTORNEY FROM CLIENT.

   A purchase by an attorney from his client of a right of action for tort, with intent to sue thereon, is champertous and void, and the purchaser cannot maintain an action on the assigned cause of action.

3. CONTRACTS ⟹108(1)—LEGALITY—PUBLIC POLICY.

   The question whether a contract is void, as contrary to public policy, is to be determined by its general tendency, and if that is opposed to the interests of the public the contract is void, even though in the particular case the intent of the parties may have been good, and no injury to the public may have resulted.

4. CHAMPERTY AND MAINTENANCE ⟹1—TERMS DISTINGUISHED.

   In "maintenance" no personal profit is expected or stipulated, the motive being simply to aid a party, with money or otherwise, to prosecute or defend his suit; while in "champerty" there is a bargain with the

plaintiff or defendant by which the champertor is to carry on the suit at his own expense, and is to derive some profit out of the thing sued for, if he prevails.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Champerty; Maintenance.]

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Joseph H. Sampliner against the Motion Picture Patents Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

For opinion below, see 243 Fed. 277.

The action is brought by the plaintiff as assignee of the Lake Shore Film & Supply Company (hereinafter called the Lake Shore Company) under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. §§ 8820–8823, 8827–8830]), to recover treble damages for injuries alleged to have been sustained by the business and property of the Lake Shore Company. The plaintiff is a citizen of the state of Ohio, and is and has been for the last 25 years an attorney at law practicing in the courts of that state.

The Lake Shore Company is a corporation organized under the laws of the state of Ohio, having its principal place of business in the city of Cleveland. Since its incorporation it has been engaged in the business of dealing in positive motion picture films or subjects, and also in projecting machines and appliances, used, sold, and leased in connection with motion picture exhibitions.

The bill of complaint is long and complicated, and occupies 60 printed pages of the record. It narrates the various steps taken by the defendants in their alleged attempt to drive the Lake Shore Company out of business, and to ruin and destroy its good will and its assets. It is alleged that because of this conspiracy it became necessary for the Lake Shore Company to employ legal assistance and that it became obligated to pay $5,000. On December 28, 1911, the Lake Shore Company assigned to the plaintiff all of its right, title, and interest in any and all of its claims for damages against the defendants, or any of them, by reason of their acts and conduct.

The plaintiff sues as an assignee of the Lake Shore Company to recover $750,000, alleging that the company had been injured in its business up to December 28, 1911, to the extent of $250,000, and that by reason thereof he is entitled under the Sherman Anti-Trust Act of July 2, 1890, and the Act of Congress of Oct. 15, 1914 (38 Stat. 730, c. 323), amendatory thereof, to treble damages, making the sum of $750,000.

The defendants in their answer set up two affirmative defenses—the statute of limitations and champerty. As respects the latter it "alleges, upon information and belief, that at the time of said alleged purchase, it was, and is now, the law of the state of Ohio that an attorney who purchased a demand with full knowledge and notice that the same was contested and would be litigated, and with the intent and for the purpose of bringing an action thereon, was guilty of maintenance and champerty, and got no title to such demand by such purchase which could be enforced either at law or in equity, and that the same was at said time, and still is, the law of the state of New York; alleges, upon information and belief, that the plaintiff purchased the demand set forth in the complaint with full knowledge and notice that the same was contested and would be litigated, and with the intent and for the purpose of bringing action thereon."

On May 22, 1917, an order was entered granting a separate trial on the issue of champerty, and providing that, if the judgment of the court or the verdict of the jury on that issue should be in favor of the plaintiff, the trial of the other issues should be set for the June or October term. The case came on for trial on the issue of champerty on May 29, 1917. Testimony was taken on behalf of the plaintiff, and at the conclusion thereof the defendants moved for the direction of a verdict, on the ground that the agreement under which the plaintiff brought his action is champertous and void. The plaintiff

also asked for a direction of a verdict. The court directed a verdict for the defendant. Judgment was entered accordingly on July 12, 1917, which was in certain particulars amended on September 5, 1917.

The plaintiff brings the case here on writ of error. He assigns 63 errors, and the assignment of errors covers 104 printed pages of the record.

Rogers & Rogers, of New York City (Gustavus A. Rogers and Saul E. Rogers, both of New York City, John G. White, of Cleveland, Ohio, and C. A. Neff, Joseph Walker Magrauth, and Nathan Frankel, all of New York City, of counsel), for plaintiff in error.

Seabury, Massey & Lowe, of New York City (Samuel Seabury, William M. Seabury, and Frank de R. Storey, all of New York City, of counsel), for defendants in error Smith and Vitagraph Co. of America.

George F. Scull, of New York City (Robert H. McCarter, of Newark, N. J., of counsel), for defendants in error Thomas A. Edison, Inc., Dyer, and Pelzer.

Coudert Bros., of New York City (Samuel Seabury and Charles B. Samuels, both of New York City, of counsel), for defendants in error Berst and Pathe Frères.

Charles F. Kingsley, of New York City, for defendants in error Motion Picture Patents Co., Kennedy, Marvin, and Biograph Co.

Gifford, Hobbs & Beard, of New York City (Alfred P. W. Seaman, of New York City, of counsel), for defendant in error Kalem Co., Inc.

Dwight McDonald, of New York City, for defendant in error Waters.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The only question it is necessary for us to consider is whether the assignment of December 28, 1911, is champertous and void. If it is void, the plaintiff cannot maintain his action. If it is not void, the judgment must be reversed. The assignment states that—

"For value received the Lake Shore * * * Company * * * hereby sells, assigns, and transfers to J. H. Sampliner all of its rights and interests in and to any and all damages which it has sustained and suffered by reason of injury to its business, because of the unlawful combination and monopoly in restraint of interstate commerce, and in violation of the Sherman Anti-Trust Act, brought about, engaged in and as a result of the unlawful agreement by and between the Motion Picture Patents Company; * * * all of said parties having conspired together for the purpose of ruining and destroying the business of the Lake Shore * * * Company, and contrary to and in violation of the Sherman Anti-trust Act. * * *"

The testimony shows that the plaintiff had rendered legal services to the assignor as its general counsel in connection with the difficulties in which it found itself with the defendants, and that those services extended over a period from July, 1910, to December, 1911. The plaintiff regarded the reasonable value of his services as worth from $8,000 to $10,000. On December 10, 1911, he was asked by the president of the Lake Shore Company whether he would be willing to bring suit against the defendants, and that he replied that he would bring

the suit, being satisfied that the company had a valid claim, and that it would cost from $8,000 to $10,000. He was informed by the president of the company that it had been losing money very heavily, and it was absolutely impossible for it to undertake any litigation of that kind. He was asked what the company already owed him, and replied in the neighborhood of $9,000 or $10,000. He was told the company did not have the money and could not pay him, and thereupon he said that, if the company would pay him $5,000 in cash, he would cancel the indebtedness. After some reflection the president, Mr. Mandelbaum, told him that the corporation would transfer to him all rights it had against the defendants, if he would be willing to accept it as a satisfaction of the company's indebtedness to him. The plaintiff told him that he would think it over and give him an answer. After a few days' reflection the plaintiff expressed a willingness to accept the assignment, and was told that the board of directors wanted to know whether, if they made the assignment, the plaintiff would as a part of the consideration defend the company and its officers in case any suit was brought against them in matters growing out of their difficulties with the defendants. He agreed to do this, and the assignment was executed.

It appears, therefore, that the assignment originated, not with the plaintiff, but with the Lake Shore Company, and that the consideration for the agreement involved the payment of a past indebtedness, as well as for future services of a professional character. It is also to be noted that the invalidity of the assignment is set up, not by the client, the assignor, who has at no time sought to repudiate it, but by third parties, between whom and the plaintiff no fiduciary relations have existed.

At common law no right of action, whether a right in rem or a right in personam, whether it arose ex contractu or ex delicto, was assignable. Lord Coke wrongly attributed the rule to the doctrine of maintenance and the aversion to the "multiplying of contentions and suits." Lampets' Case, 10 Rep. 48a. The rule is older than the doctrine of maintenance in English law. As Professor Ames, in his Lectures on Legal History, 211, 212, pointed out, the reason for the rule is in the fact that a chose in action always presupposes a personal relation between two individuals and that personal relation cannot be assigned. And see Pollock on Contracts (5th Ed.) 206; Holmes, Common Law, 340, 341; 2 Spence, Eq. Jur. 850. But the courts of equity always recognized the assignment of choses in action, and in England and in this country generally statutes have been passed which have modified the rule that choses in action are not assignable at law. So that now rights of action arising ex contractu and those arising ex delicto, but not for personal torts, are assignable. The right of action which the Lake Shore Company claimed to have for the damages it sustained by reason of the tortious acts of the defendants was assignable. In United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574, 577, 146 C. C. A. 532, this court held that a right of action for property injuries based on a violation of the Sherman Act, and brought under section 7 for treble damages, is assignable.

But, assuming that the right is assignable, was there anything in the relations existing between the Lake Shore Company and the plaintiff which made it nonassignable as between them. It appears that a suit was brought in the District Court of the United States for the Northern District of Ohio to restrain the prosecution of any action based upon the assignment, it being claimed that the cause of action was nonassignable, and that relief was refused on the ground that if it were nonassignable as claimed the defense was as available at law as in equity. This was carried on appeal to the Circuit Court of the Sixth Circuit, which affirmed the court below. General Film Co. v. Sampliner, 252 Fed. 443, 164 C. C. A. 367.

While there is a liberty of contract, which in this country is protected by constitutional provisions, yet the right of parties to make contracts may be in a measure restricted by the relations which exist between them as in the case of a trustee and cestui que trust, guardian and ward, parent and child, and attorney and client. The general rule of public policy which discountenances transactions between persons who are situated in a confidential relation towards each other is regarded as applying with particular force to attorneys at law, and they are restricted in dealing with those with whose interests they are intrusted. This is not only because they are officers of the court, but also because of the fiduciary relation in which they stand to their clients and the great influence they exert over their minds. The courts in some cases have gone so far as to say that a gift from a client to his attorney during the continuance of the relation is absolutely void. These cases go, not upon the ground of the inability of the client to make the gift, but upon the inability of the attorney to accept it. Holman v. Loynes, 4 De G., M & G. 270; Morgan v. Minott, 6 Ch. Div. 638; Powell v. Powell (1900) 1 Ch. 243; Greenfield's Estate, 14 Pa. 489, 506. In other cases the gift has not been regarded as void ipso facto, but it has been viewed with the greatest suspicion, and the burden has been placed on the attorney to show the utmost good faith and freedom from all undue influence. Nesbit v. Lockman, 34 N. Y. 167; Bolles v. O'Brien, 63 Fla. 342, 354, 59 South. 133; Whipple v. Barton, 63 N. H. 613, 3 Atl. 922.

The law is well settled that if an attorney purchases any property belonging to his client—not property which is at the time in litigation—the transaction is viewed with suspicion, and he assumes the heavy burden of proving that the transaction is characterized by the utmost fairness and good faith, and not tainted with fraud or undue influence, and that the client acted upon the fullest information and advice. But when he acquires the title to property which is at the time in litigation, or which is about to come into litigation, it is a still more serious matter.

The common law from a very early period made it a crime, designated as common barratry, to induce others to commence even just suits, if done with an oppressive motive, and it punished the offender by fine and imprisonment. And by St. 12 Geo. I, c. 29, it was enacted that if any one who was convicted of common barratry practiced as an attorney or solicitor in any suit he should be transported

for seven years. And so the common law also punished as a crime the offense of maintenance, which is described by Blackstone as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it." 4 Blackstone, 135. This he declares is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. Champerty, a species of maintenance, was also punished by the common law.

"It signifies," Blackstone says, "the purchasing of a suit, or right of suing: a practice so much abhorred by our law that it is one main reason why a chose in action, or thing of which one hath the right, but not the possession, is not assignable at common law, because no man should purchase any pretense to sue in another's right. These pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law; 'Qui improbe coeunt in alienam litem, ut quic quid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur.' Those who knavishly interfere in other men's suits, for the purpose of sharing whatever may be awarded by the verdict, are liable to the Julian law de vi privata (of secret influence); and they were punished by the forfeiture of a third part of their goods, and perpetual infamy."

In Sherman's Roman Law in the Modern World, vol. 2, p. 456, it is said:

"An agreement with a client that remuneration for conducting his law suit should be a certain portion of the proceeds (pactum de quota litis) was forbidden; an advocate making such an agreement was disbarred. This Roman prohibition, designed to uphold the honor of the legal profession, has exerted a strong influence in modern law."

And see Mackenzie's Roman Law, p. 446.

[4] In maintenance no personal profit is expected or stipulated. The motive is simply to aid a party, with money or otherwise, to prosecute or defend his suit. Spicer v. Jarrett, 61 Tenn. (2 Baxt.) 454, 457. And in champerty there is a bargain with the plaintiff or defendant by which the champertor is to carry on the suit at his own expense and is to derive some profit out of the thing sued for if he prevails. Roberts v. Cooper, 20 How. 467, 484, 15 L. Ed. 969; Breeden v. Frankford Marine, etc., Insurance Co., 220 Mo. 327, 119 S. W. 576. And see 11 C. J. 234. And a champertous agreement is of course void and unenforceable.

In Peck v. Heurich (1897) 167 U. S. 624, 630, 17 Sup. Ct. 927, 929 (42 L. Ed. 302), the Supreme Court declared that—

"According to the common law, as generally recognized in the United States, wherever it has not been modified by statute, and certainly as prevailing in the District of Columbia, an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover, is contrary to public policy, unlawful, and void, as tending to stir up baseless litigation."

The plaintiff contended in this court that, as his assignor was not objecting to the validity of the assignment on the ground of inade-

quacy of consideration, the objection certainly could not be raised by a third party. We may concede that ordinarily the validity of an assignment cannot be attacked by third parties on the ground of inadequacy of consideration. As between an assignor and an assignee, if the inadequacy of the consideration is sufficient to shock the conscience of a chancellor, it may be in some cases sufficient ground for setting a transaction aside. But the wrong in such cases is a private wrong to the assignor, and third parties are without standing to complain. And if assignor and assignee stand in a fiduciary relation there is still no right in third persons to allege the invalidity of the assignment solely on that ground. But the weakness of this contention in this case lies in the fact that the question here is not between the plaintiff and the defendants alone. If it were, the argument advanced might be conclusive. The question is one of public policy, and upon that ground the decision rests.

The plaintiff argued in this court and in the court below that the consideration for the assignment of the Lake Shore Company's cause of action was the extinguishment of a precedent debt due from the assignor and that therefore the assignment was valid and not champertous. If his premise is correct, there is very respectable authority which would support his conclusion. Professor Ames in his Lectures on Legal History, 258, note 1, states that—

> "The distinction was established at an early period, that the grant of a power of attorney to a creditor was not maintenance while a similar grant to a purchaser or donee was maintenance. 34 Hen. VI, 30, 15; 37 Hen. VI, 13–3; 15 Hen. VII, 2–3; South v. Marsh (1590) 3 Leon. 234; Harvey v. Beekman (1600) Noy, 52. As late as 1667–1672, the same distinction prevailed also in equity."

In 1 Bacon's Abridg. 360, 361, referring to champerty it is said that—

> "A grant of part of a thing in suit, made in consideration of a precedent debt is not within the meaning of the statute, but such only as is made in consideration of maintenance."

And again:

> "But neither a conveyance executed, pending a plea, in pursuance of a precedent bargain * * * are within the meaning of the statute."

In 11 C. J. 247, the law is stated as follows:

> "A grant or assignment of an interest in the subject-matter of the suit, made by the client to his attorney in consideration of a precedent debt, is not contrary to public policy or champertous. Nor is it made so by a statute which prohibits an attorney from buying a thing in action with intent to bring an action thereon, except in payment for services rendered."

In Tapley v. Coffin, 12 Gray (Mass.) 420 (1859), an attorney and client agreed that the attorney was entitled to $1,240 for past services and that he should have $400 in full satisfaction for future services in certain suits. And in order to secure the payment of these sums the client assigned to the attorney his share in his father's estate then under administration, and it was agreed that the attorney should collect and receive the same and after deducting the necessary ex-

penses and sums of $1,240 and $400 pass over to the client the residue. The court sustained the legality of the agreement and said:

"It does not present a case of champerty or maintenance."

In Jordan v. Gillen, 44 N. H. 424 (1862), the client assigned to his attorney a cause of action sounding in tort, the consideration being the discharge of a precedent debt due from the client to the attorney. The transaction was held to be not invalid and that the attorney would have the right to enforce the claim.

The New York statute laws of 1818 made the purchase of a chose in action by an attorney a ground of defense against a suit upon it, but where it was received bona fide in payment of an antecedent debt it was allowed by a proviso in the statute. See Watson's Executors v. McLaren, 19 Wend. (N. Y.) 557, 565 (1838), affirmed in 26 Wend. (N. Y.) 425, 37 Am. Dec. 260.

[1] But the difficulty with all this is that this court cannot accept the plaintiff's premise and hold that the consideration for this assignment was a precedent debt which was thereby extinguished. At the close of the plaintiff's case in the court below, when counsel for defendants rested and asked for the direction of a verdict, the plaintiff's counsel stated to the court the issue as follows:

"The defense is that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, that it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation."

This being the issue as the plaintiff's counsel understood it, and which was not controverted by defendants, the plaintiff and defendants each moved for a directed verdict in their favor. There was the plaintiff's testimony which, if the court accepted it, would have justified a finding that the cause of action was assigned for an antecedent indebtedness. There was other testimony from which a court might infer otherwise. No bill had ever been rendered by the plaintiff to the Lake Shore Company for the legal services the plaintiff says he rendered between July, 1908, and December, 1911, and no demand of payment had been at any time made. No entry had been made in the Lake Shore Company's minute book, either of the making of this assignment or of a meeting of the directors at which this assignment was discussed or authorized. No disclosure of this assignment was made to the Mutual Film Company to which, in March, 1912, the Lake Shore Company sold all its assets, notwithstanding the fact that the president of the latter company entered the employ of the Mutual Film Company as general manager at that time, and remained with it in that capacity until March, 1913. The above facts are disclosed by the testimony of the plaintiff's own witnesses. The weight to be given to the testimony and the inferences to be drawn from it were for the court to determine, in view of the request made by each side to direct a verdict in their favor. This was equivalent to a request for a finding of fact and as the court directed the jury to find a verdict for one of them, both are concluded on the facts so found. Beuttell v. Ma-

gone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654. In the case at bar the trial court said:

"Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon."

He accordingly directed a verdict for the defendants.

[2] This court is therefore not at liberty to review the trial court's findings of fact, but is as much concluded as it would be by a verdict of the jury. Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Runkle v. Burnham, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694. And we must dispose of this case upon the theory that the plaintiff did not in fact take this assignment to extinguish a precedent debt, but that he purchased it for the purpose of suing on it; that he, an attorney at law, purchased from his client for $5,000 a cause of action which he values at $750,000. The question we must answer, therefore, is whether the law sanctions such a transaction between parties standing in the confidential relation of attorney and client. We are satisfied that the common law does not sanction it.

In Tyrrell v. Bank of London, 10 H. L. Cas. 26, 44, Lord Chancellor Westbury used language which this court heartily approves and gladly adopts.

"There is no relation known to society," he said, "of the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honorable observance, than the relation between solicitor and client; and I earnestly hope that this case will be one of the many which vindicate that rule of duty which has always been laid down, namely, that a solicitor shall not, in any way whatever, in respect to the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled."

In 1823 Chief Justice Swift, of Connecticut, published Swift's Digest, a famous work in its time, and in volume 2, p. 57, said that the purchase of a lawsuit by an attorney is champerty in its most odious form. And he added that—

"As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character to speculate in lawsuits."

It is said, however, that this assignment was made in Ohio; that the assignor was an Ohio corporation; that the assignee was domiciled in Ohio; that apparently there was at the time no intention of bringing suit on the assignment elsewhere than in Ohio; that whether the lex loci contractus or the lex loci solutionis is to determine the validity of the assignment that law in this case is the law of Ohio. There is no disagreement on either side on this phase of the subject. We have examined the cases in Ohio, and we have been unable to discover that the question which this case presents has been passed upon by the courts of that state, or that there is anything in the statutes of the state or in the decisions of its highest court which should lead us to think that by the law of that state the assignment is valid. The case of Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L. R. A. 723 (1892) is certainly clearly

distinguishable in its facts from the case at bar. The agreement the attorney and client made in that case involved an assignment by the client to the attorney of a judgment obtained by the attorney for the client; it being agreed that the attorney should render legal services in an effort to collect the judgment, and that he would advance costs and expenses involved in the proceeding, one-half of which was to be repaid by the client in case of failure, and in case of success the net proceeds of the judgment were to be equally divided between them. It is apparent that the assignment was for the purpose of security and to provide for the payment of the costs and expenses, including the attorney fees. It does not appear what the proportion was between the consideration advanced by the attorney and the share of the judgment he was to receive as a fee. The agreement was held valid and not champertous. But the opinion of the court clearly indicates we think that it would not have sustained such an agreement as the one now in suit. For the court used the following language:

"The conduct of attorneys is subject to proper scrutiny by the courts. The maintenance of a high character for dignity and integrity on their part, is essential to the security of community, and the due administration of justice. Any infraction of the letter of this statute [the penal statute of February 10, 1824] would entail its penal consequences upon an offending attorney, and the courts would not hesitate to hold void any contract violative of its spirit, whether coming within the strict letter or not. So, too, the courts have been, and continue to be, careful not to sanction contracts which appear to encourage a gambling spirit, one leading to the prosecution of pretended or obsolete claims, for a possible high reward."

In Davy v. Fidelity & Casualty Ins. Co., 78 Ohio St. 256, 85 N. E. 504, 17 L. R. A. (N. S.) 443, 125 Am. St. Rep. 694 (1908), the court held that, while a contract for an attorney's fee contingent on the amount to be recovered is ordinarily valid in that state, still if the contract is such as will prevent the client from settling his claim without the consent of the attorney, it is champertous and voidable at the option of the client, and its illegality will avail in any action against a third party which is based on the contract.

And the courts of Ohio hold that a contract is champertous and void where a client and his attorney agree that the latter may prosecute the suit in his own name and at his own risk and cost, and which deprives the client of the right to control or compromise the suit, and which gives the attorney a contingent fee to be deducted from the proceeds of the suit and is dependent upon the success thereof. Brown v. Ginn, 66 Ohio St. 316, 64 N. E. 123. See Steward v. Welch, 41 Ohio St. 483; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 5, 29 N. E. 573, 14 L. R. A. 785; Railroad Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924.

[3] The question whether an agreement is void on the ground that it is contrary to public policy is to be determined by its general tendency. If that is opposed to the interests of the public, the agreement is void, even though in the particular case the intent of the parties may have been good and no injury to the public may have resulted. Woodstock Iron Co. v. Richmond, etc., Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; Oscanyan v. Winchester Repeat-

ing Arms Co., 103 U. S. 261, 26 L. Ed. 539; Meguire v. Corwine, 101 U. S. 108, 25 L. Ed. 899. As was said by Chief Justice Prentice in Connors v. Connolly, 86 Conn. 641, 656, 86 Atl. 600, 605 (45 L. R. A. [N. S.] 564):

> "It matters not that any particular contract is free from any taint of actual fraud, oppression, or corruption. The law looks to the general tendency of such contracts."

See Greenhood on Public Policy, p. 5; Richardson v. Crandall, 48 N. Y. 348. And Mr. Justice Field said in Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868:

> "The law looks to the general tendency of such agreements, and it closes the door to temptation, by refusing them recognition in any of the courts of the country."

It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results. Palmbaum v. Magulsky, 217 Mass. 306, 308, 104 N. E. 746, Ann. Cas. 1915D, 799.

The general tendency of such agreements as the attorney and client made in this case is contrary to the public interests. The agreement concerns the administration of justice in the courts, and it is made by an officer of the courts, who undertakes to speculate in his client's suit. The attorney knows much better than his client can possibly know the value of a particular cause of action and the chances as to its successful prosecution in the particular case, and even if there is a full and honest disclosure to the client there are strong reasons which should forbid the purchase. It would be a gross impropriety in a judge to buy a lawsuit. The impropriety may be less in degree, but it is none the less an impropriety for an attorney, who is an officer of the court and a minister of justice, to speculate in the suits of his client. It would tend to impair public confidence in the profession and in the administration of justice itself.

Judgment affirmed.

(257 Fed. 1)

KEITH LUMBER CO. v. HOUSTON OIL CO. OF TEXAS et al.

(Circuit Court of Appeals, Fifth Circuit. April 2, 1919.)

No. 3220.

1. RECEIVERS ⟹204—RECEIVERSHIP SUIT—DISCHARGE—ANCILLARY SUIT.

Decree discharging receivers of lumber company and an oil company, and turning their properties over to the companies under recited terms, did not destroy the jurisdiction of the court, which had previously attached, over an ancillary suit by the receiver of the oil company against a second lumber company, which had been made a party to the receivership suit by an amended bill.

2. RECEIVERS ⟹178—ACTIONS—PARTIES—SUIT FOR TIMBER.

Lumber company *held* not a necessary party to suit ancillary to receivership proceedings by receiver of oil company against a second lumber company for the timber on certain land as to which the first lumber company had a stumpage contract, which did not place ownership of the timber in it.

3. APPEAL AND ERROR ⟹684(4)—REVIEW—MOTION TO DISMISS—ABSENCE OF EVIDENCE.

Where testimony, on which the action of the District Judge in denying motion to dismiss suit on ground its subject-matter had been destroyed was based, is not in the record, the Circuit Court of Appeals cannot determine that the action taken was erroneous.

4. ACKNOWLEDGMENT ⟹52—SIGNING AND DELIVERY—INFERENCE FROM ACKNOWLEDGMENT.

The acknowledgment of a deed, as recited in the record, carries with it the necessary inference of signing, and delivery also may be inferred from acknowledgment, though it is not a necessary inference.

5. DEEDS ⟹208(1)—DELIVERY—SUFFICIENCY OF EVIDENCE.

In suit by a receiver for an oil company and a lumber company against another lumber company for the timber on certain lands, evidence consisting of the fact of payment, of the signing of the deed, of the fact of acknowledgment, and the duty and obligation under which the grantor was at the time to hold the deed for the plaintiff lumber company, *held* sufficient to support finding of delivery.

6. ESTOPPEL ⟹37—AFTER-ACQUIRED TITLE.

A deed using the words "grant, sell, and convey," not "quitclaim," and conveying property by specific description, not merely the "interest" owned by the grantor, was effective to pass an after-acquired title.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

7. PROPERTY ⟹9—TITLE—SUFFICIENCY OF EVIDENCE.
In suit by receiver of an oil company and a lumber company against another lumber company for the timber on certain lands, evidence *held* sufficient to authorize finding that title at the time of institution of the suit was in plaintiff lumber company and the oil company.

8. ESTOPPEL ⟹3(1)—EVIDENCE ⟹272—ESTOPPEL BY RECORD—DECLARATIONS AGAINST INTEREST.
Excerpts from a pleading introduced by defendant in an equity suit are to be taken as evidence of the efforts of the several parties to procure advantage over their adversaries, rather than as matter in estoppel, or as declarations against interest, to be taken advantage of by one not a party to the suit.

9. APPEAL AND ERROR ⟹1051(1)—HARMLESS ERROR—EVIDENCE.
The erroneous introduction in evidence of a decree was harmless, where there was ample evidence outside of the record to show the fact of title for which the decree was used.

10. VENDOR AND PURCHASER ⟹242—DEEDS—REGISTRATION—PROTECTED CLASS—BURDEN OF PROOF.
In view of Rev. St. Tex. 1911, art. 6824, requiring registration, but declaring a deed valid, though unrecorded, as to all subsequent purchasers with notice or without valuable consideration, so making it void only as to purchasers for value without notice, a person undertaking to establish the invalidity of a deed has the burden to prove he is within the protected class.

11. VENDOR AND PURCHASER ⟹244—INNOCENT PURCHASER FOR VALUE—SUFFICIENCY OF EVIDENCE.
In suit by receiver of an oil company and a lumber company for the timber on certain land, evidence *held* to justify finding that defendant lumber company was not an innocent purchaser for value.

12. LIS PENDENS ⟹24(1)—RECEIVERSHIP SUITS—INVENTORY AND POSSESSION BY RECEIVERS.
Where the timber on certain land had been inventoried as part of the estates of a lumber company and an oil company, involving which receivership suits were pending, and the timber was in the custody of the receiver, it could not be purchased from third person without notice on account of the lis pendens.

13. APPEAL AND ERROR ⟹931(6)—PRESUMPTIONS FAVORING COURT BELOW—IMPROPER EVIDENCE.
Where the trial was by the court, it will be assumed that no improper evidence was considered.

14. COVENANTS ⟹2—WARRANTY OF TITLE NOT OWNED—RIGHT OF GRANTEE.
There is nothing to prevent a person from warranting title to land that he neither owns nor claims, and the grantee had a right to stand on the terms of his deed.

Appeal from the District Court of the United States for the Southern District of Texas; Walter T. Burns, Judge.

Suit by the Houston Oil Company of Texas and its receiver against the Keith Lumber Company and others. From judgment for plaintiffs, defendant company appeals. Judgment modified, and, as modified, affirmed.

C. L. Carter, of Houston, Tex. (Geo. D. Anderson, of Beaumont, Tex., W. A. Parish, of Houston, Tex., Anderson & Masterson, of Beaumont, Tex., and Baker, Botts, Parker & Garwood, of Houston, Tex., on the brief), for appellant.

H. O. Head, of Sherman, Tex., and T. M. Kennerly and E. E. Townes, both of Houston, Tex. (Fred L. Williams and Kennerly,

Williams, Lee & Hill, all of Houston, Tex., and Head, Dillard, Smith, Maxey & Head, of Sherman, Tex., on the brief), for appellees.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Suit was by the Houston Oil Company of Texas and its receiver against Keith Lumber Company and others, for the timber on section 102, certificate 120, T. & N. O. Ry. Co., in Hardin and Jefferson counties, Tex. C. M. Votaw, patentee, is the common source of the respective claims to title. After the timber deed from Votaw (acknowledged in 1902), under which complainants claim, but prior to its registration in 1906, Votaw made a conveyance of the land in 1905, under which Keith Lumber Company asserts title, questioning the execution and validity of the prior deed, and the acquisition of rights under it by complainant, and claiming to be an innocent purchaser for value, without notice.

Matters for consideration are:

I.—Jurisdiction.
II.—Parties.
III.—Dismissal.
IV.—Title of Houston Oil Company.
  (1) Deed from Votaw to Kirby Lumber Company.
  (2) Sale before acquisition.
  (3) Validity of deed.
  (4) Passage of title from Kirby Lumber Company to Houston Oil Company.
    (a) Contract with Kirby.
    (b) Trust relation of Kirby Lumber Company.
    (c) Pleadings and decree in equity No. 54.
V.—Title of Keith Lumber Company.
VI.—Defendant as innocent purchaser for value.
  (1) Burden of proof.
  (2) The evidence.
    (a) Testimony of Kirby and Keith.
    (b) Contract of Keith Lumber Company with J. N. Votaw and Turner.
    (c) Lis pendens.
VII.—Errors assigned as to admission of evidence.
VIII.—Liability on warranty.
IX.—Modification of judgment.

[1] I.—*Jurisdiction.*—This suit, instituted in the Southern district of Texas, involves title to real property situate in the Eastern district of that state. None of the defendants resides in the Southern district. On January 28, 1904, the Maryland Trust Company filed suit in the Southern district against the Kirby Lumber Company and the Houston Oil Company of Texas for debt and foreclosure, and prayed for appointment of receivers for the companies. On March 17, 1904, permanent receivers were appointed for each company. This instant suit is ancillary to the main receivership case. The statement of appellant that it was not made a party until after the prop-

erty had been withdrawn from the custody of the court and ordered returned to its owners is not sustained by the record. It appears that the Keith Lumber Company was impleaded by an amended bill, filed on December 29, 1908. On July 28, 1908, a decree was entered fixing the rights of the parties in the receivership suit, but the receivers were not discharged and the properties were not redelivered. On the 15th of April, 1909, an order was made for the delivery of the property. The decree specifically provided that the Houston Oil Company should receive the property subject to all claims, etc., then existing under the decree of July 28, 1908, or which might thereafter be made against the receiver, arising out of the receivership, and the court retained jurisdiction over all of the properties and the parties for the purpose of determining the demands, etc., against the receivers arising out of the receivership. It was also provided that nothing in the decree should affect the status of any pending or undetermined litigation, but that such litigation might continue to final determination in the name of the receiver. That the court had jurisdiction at the time of the institution of the suit is determined by Gordon v. Dillingham, 158 Fed. 1019, 86 C. C. A. 672, White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67, and Jenkins v. Dillingham, 220 U. S. 620, 31 Sup. Ct. 723, 55 L. Ed. 613. The decree discharging the receivers and turning the property over to the owners under the recited terms must be held not to have destroyed the jurisdiction which theretofore attached.

[2] II.—*Parties.*—Appellant contends that the Kirby Lumber Company is a necessary party. The allegation of the complaint is to the effect that, at the time of the appointment of receivers, the Oil Company owned and was in possession of the property involved, and that it passed into the control of the receivers. It is also alleged that there is growing and standing yellow pine timber, covered by a "stumpage contract" between the Houston Oil Company and the Kirby Lumber Company, under which the latter has the right to cut the timber growing upon the land and convert it into lumber, etc. Such an allegation is not equivalent to an allegation of ownership, nor does the stumpage contract referred to place the ownership of the timber in the Kirby Lumber Company. The contract gives the Kirby Lumber Company the right to cut 8,000,000,000 feet of timber from the very extensive land holdings of the Oil Company, upon payment of the price and compliance with other conditions set forth. At most the contract is an executory one, under the terms of which the Lumber Company has the right to acquire timber, but the contract may be fulfilled without taking timber from this land. The right with reference to the land is not such as to make the Lumber Company a necessary party.

[3] III.—*Dismissal.*—The appellant contends that the subject-matter of the suit has been destroyed, and that therefore the suit should be dismissed. This motion was tried by the District Judge and determined adversely to appellant. The testimony upon which this action was based is not in the record, and it is impossible to determine that the action taken was erroneous. The record shows that timber has been cut, but does not show that all of it has been removed, nor

that it will be impossible to remove additional timber during the period given by the deed.

[4, 5] IV.—*Title of Houston Oil Company.*—(1) While it is contended that plaintiff did not meet the requirement of proof of the deed from Votaw to Kirby Lumber Company, there seems to be no serious contention that Votaw did not sign the instrument offered as a deed. It was acknowledged, according to the recitations of the record, on January 9, 1902. The acknowledgment carries with it the necessary inference of the signing. The testimony of Kirby would be inconsistent with any other hypothesis. Delivery may also be inferred from acknowledgment, though it is not a necessary inference. Certain statements in the pleadings of the parties in the receivership cases have been introduced to negative delivery. These, however, were evidently not regarded by the trial judge as of sufficient weight to destroy the force of the evidence of Mr. Kirby, who, according to the record, was familiar with the formation of the corporations and with the acquisition of all of the land claimed by the Houston Oil Company. From his testimony it appears that Votaw, the grantor in the deed, was at the time of the acknowledgment the land agent of the Kirby Lumber Company, and entitled to possession, and in actual custody, of the deeds and other muniments of title of the Lumber Company. The circumstances were such that physical delivery from Votaw to another person would not have been necessary. The testimony is to the further effect that Votaw received pay for the land from the Houston Oil Company. Considering the fact of payment, the fact of the signing of the deed, the fact of the acknowledgment, and the duty and obligation under which he was at the time to hold the deed for the Kirby Lumber Company, the evidence is ample to support a finding of the necessary delivery.

[6] (2) Appellant insists that the deed from Votaw to the Kirby Lumber Company, not being a warranty deed, did not pass the title after acquired by Votaw when the patent was issued to him by the state. The deed cannot be regarded as merely a quitclaim. It uses the words "grant, sell, and convey," not "quitclaim." That which is conveyed is not described as the "interest" owned by Votaw. There is a specific description of the property. The deed would have been effective to pass an after-acquired title. Votaw was, in fact, not without rights in the land acquired prior to the deed. The record shows that the land was purchased from the state by J. M. Carpenter, as additional to a purchase from the state occupied as his home for the period required by the law. There is nothing in the law which prevented him from contracting with reference to his interest after purchase, and such a contract was made with Votaw prior to the execution of the deed by Votaw.

(3) The legality of the sale is also questioned upon the ground that the land was bought by Carpenter under an act which forbade sale to a corporation. The sale was made under the act of 1895 (Acts 24th Leg. c. 47) and the amendments of 1897 (Acts 25th Leg. c. 129). A prior act (General Laws of 1889, c. 93) had a provision to the effect that no sale should be made to a corporation. From the circumstance that this statute of 1889, as well as the act of 1895, was

incorporated into a revision or codification of the laws of the state, it was insisted that the act of 1889 was effective. The act of 1895 was a complete system within itself, and was very evidently intended to supersede the prior land sales acts. The proposition upon which appellant depends is adversely determined by the case of State of Texas v. Houston Oil Co. (Tex. Civ. App.) 194 S. W. 424.

[7] (4) *Passage of Title from the Kirby Lumber Company to the Houston Oil Company.*—(a and b) The formation of the Houston Oil Company and the Kirby Lumber Company was due to the activities of John H. Kirby. He and his associates, among whom was C. M. Votaw, had acquired title and inchoate and other rights to large bodies of timber lands. The Houston Oil Company was organized to pay for and take the title to these lands, and the Kirby Lumber Company was formed to mill the timber. One of the initial steps in the organization of the enterprises was a proposition by Kirby to turn over to the Houston Oil Company the lands which he owned and controlled. Included in the lands described in general terms by the proposition made were the lands of "Kirby and Votaw." Kirby testified that, among the Kirby and Votaw lands to be conveyed to the Houston Oil Company, was the timber in controversy. He further testifies that, at the time, the right of an oil corporation formed under the laws of Texas to hold timber was questioned, and it was concluded to place the legal title to this timber in the Kirby Lumber Company, to be held in trust for the Houston Oil Company. He testifies that the price of the timber was paid to Votaw by the Houston Oil Company, that Votaw was directed to make a deed to the Kirby Lumber Company, and that this was done. This testimony would, within itself, be sufficient to authorize the court to hold that title, at the time of the institution of this suit, was in complainants.

[8] (c) The pleadings in the equity cases heretofore referred to show that the Houston Oil Company, the Kirby Lumber Company, and John H. Kirby all regarded the timber in controversy as a part of the subject-matter of the contract, under the terms of which title to the lands was to be placed in the Houston Oil Company, and the right to mill the timber in the Kirby Lumber Company. The controversies of the parties were with reference to the character of payment to Kirby and associates for the lands by the Houston Oil Company, and with regard to the terms upon which the timber was to be cut and paid for by the Kirby Lumber Company. Excerpts from the pleading introduced by defendants are rather to be taken as evidence of the efforts of the several parties to the litigation to procure advantage over their respective adversaries than as matter in estoppel, or as declarations against interest, to be taken advantage of by one not a party to the suit. There was payment by the Houston Oil Company to Votaw for the timber in question; there is recognition of the fact of payment by, and ownership in, the Oil Company by the Kirby Lumber Company and John H. Kirby. The controversies between the parties in no way affected the title to the advantage of strangers to the suit.

[9] Objections were made to the introduction of the decree of July 28, 1908, in equity causes 54, 71, 75, and 84, consolidated, in which title to the timber in controversy is decreed in Houston Oil Company. The Keith Lumber Company was not a party to the suit and is not bound by the decree. The decree was subsequent to the institution of this suit, but prior to the filing of the amended bill by which the Keith Lumber Company was made a party. The Houston Oil Company, however, in any event, does not have to depend on the decree for title. Its rights existed at the time the main suit was instituted. In so far as this title is concerned, the decree merely declares rights which had been theretofore acquired.

If the introduction of the decree was erroneous, the error was of a character not to require reversal, because there is ample evidence outside of the decree to show that whatever interest in the timber C. M. Votaw owned passed before the institution of this suit, either directly to the Houston Oil Company, or from the patentee to the Kirby Lumber Company, and thence to the Houston Oil Company.

V.—*Title of the Keith Lumber Company.*—After the date of the deed to the Kirby Lumber Company, Votaw, on October 16, 1902, conveyed the land to John J. Gannon. Subsequently Gannon conveyed to J. R. Davenport all but 67 acres. On May 25, 1903, Gannon conveyed to William Weiss the 67 acres excepted from the conveyance to Davenport. Gannon also conveyed on November 14, 1905, the 67 acres to J. R. Davenport. On the same day Wm. Weiss and T. H. Bass conveyed the timber on the 67 acres to Davenport, and Votaw executed a deed of confirmation to Davenport to all of the land and timber on the entire section. Contemporaneously, Davenport conveyed to W. C. Tyrrell, who purchased for the Keith Lumber Company 312 acres of section 102 and the timber on the 67 acres and other land.

[10] VI.—*Defendant as an Innocent Purchaser for Value.*—(1) *Burden of Proof.*—Defendant insists that the burden of proof is upon complainants. The validity of the deed is not dependent upon its registration. Registration is authorized for the protection of the purchaser, and required for the protection of other persons against the grantor. One buying land from the owner of land acquires ownership thereof. The statute of Texas (article 6824, R. S. 1911) requiring registration declares a deed valid, though unrecorded, as to all subsequent purchasers with notice thereof or without valuable consideration. It is only as to purchasers for valuable consideration without notice that the unrecorded deed is void. The person undertaking to establish the invalidity of the deed has the burden of proving that he is within the protected class. Nothing in this case suggests an exception to, or modification of, the general rule.

[11] (2) *The Evidence.*—(a) *Testimony of Kirby and Keith.*—The testimony of John H. Kirby is unequivocal to the effect that, prior to the purchase by the Keith Lumber Company, he had told Keith, the president of the Lumber Company, that title was in the Houston Oil Company, and that he especially warned Keith against J. R. Davenport, who at the time held a claim under the second deed from Votaw. These statements are denied by Keith, but he acknowledges

that Kirby told him that he (Kirby) claimed no right under a contract that will be hereinafter referred to between J. N. Votaw and Turner, on the one side, and the Keith Lumber Company, on the other, but that he did not know what would be done by the Houston Oil Company, which had acquired the right of Keith Lumber Company. It is apparent that the District Judge accepted the statements of Mr. Kirby. No sufficient reason appears why this finding should be disturbed.

Keith knew of the relation of Kirby to the Houston Oil Company and of Kirby's knowledge of its affairs. He made no further investigation. The receivership was pending in Houston, where the conversation was had. The receivers and the papers in the case were accessible. If Kirby's statement be accepted, Keith, notwithstanding an unequivocal statement that the ownership was not in Davenport, without any further investigation, paid Davenport for the land.

(b) On August 30, 1899, J. N. Votaw and W. H. Turner executed to appellant a contract by which they agreed to sell to appellant all the merchantable timber on a large body of land in Jefferson and Hardin counties, Tex., including section 102 in controversy. This contract was to run for 20 years. There is nothing in the record to indicate that Turner and Votaw at the time owned any interest in the lands. The terms of the contract, and other evidence, suggest that it was the expectation of the contractors to thereafter acquire the lands. The Keith Lumber Company was to pay for the timber as cut, except that an initial payment was made, which was to be used by the contractors as working capital. Turner transferred his interest in this contract to John H. Kirby. Upon the formation of the Kirby Lumber Company, this contract was by the Keith Lumber Company transferred to the Kirby Lumber Company, and passed to the Houston Oil Company. The contract cannot be said to pass any title to the Houston Oil Company, nor is it clear that it estops the Keith Lumber Company from acquiring title to any of the land or timber covered by its terms. It may be that it could have been considered in passing upon the question of notice to the Lumber Company, but it could not be effective to disturb the court's finding upon that issue.

[12] (c) *Lis Pendens.*—At the time of the purchase of the land by the Keith Lumber Company the receivership suits were pending. There is evidence that would sustain a finding that the timber in controversy had been inventoried as a part of the estate, and that it was in the custody of the receivers, precluding purchase without notice.

[13] VII.—*Errors in Admitting Evidence.*—A number of errors are assigned as to the introduction of evidence. Most of these are disposed of by the foregoing discussion. It is believed that, in some instances, abstract errors have been committed, but the trial was before the court, and it is assumed that no improper evidence has been considered. Every finding essential to the judgment is supported by ample evidence, properly admitted. Each assignment has received careful consideration, but no reversible error is disclosed.

[14] VIII.—*Liability on Warranty.*—The deed from William Weiss

and T. H. Bass to J. R. Davenport to the 67 acres is one of general warranty. By the terms of the deed, both of the grantors became warrantors of title of all the land; and the judgment, which limits the liability of the executors of Weiss to the interest claimed by Weiss, is erroneous. There is nothing to prevent a person from warranting title to land that he neither owns nor claims, and that is what was done by Weiss under the terms of the deed. As between the grantors, an equitable adjustment may be had; but the grantee has a right to stand on the terms of his deed, no reason for the application of a different principle appearing.

IX.—*Modification of Judgment.*—The judgment perpetually enjoins the Keith Lumber Company from going upon or taking timber from the land. The deed of C. M. Votaw to the Kirby Lumber Company limits the right of the grantee to take the timber to a period of 20 years from January 9, 1902. All rights of Votaw in 312 acres except that specifically deeded to the Kirby Lumber Company, subsequently passed to the Keith Lumber Company. The judgment should be so modified as to enjoin the Keith Lumber Company from taking timber until January 9, 1922.

The judgment is modified to conform to the foregoing holdings, and, so modified, is affirmed.

(257 Fed. 9)

STARK et al. v. STARK BROS. NURSERIES & ORCHARDS CO.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1919. Rehearing Denied June 6, 1919.)

No. 5181.

1. TRADE-MARKS AND TRADE-NAMES ⟹59(4)—INFRINGEMENT—COLORABLE IMITATION.

Plaintiff's trade-mark, consisting of the word "Stark" above the word "Trees," the former in letters successively decreasing in size, the latter in letters successively increasing in size, *held* infringed by defendants' device, different in shape, and bearing a number of words, but having the word "Stark" in the center, in the largest letters, in white on the dark background of a tree; exact similitude not being necessary, but it being enough that an ordinary purchaser is likely to be deceived when they are not placed side by side.

2. TRADE-MARKS AND TRADE-NAMES ⟹59(4)—INFRINGEMENT—USE OF SURNAME.

Right of one to use his surname as a mark, without infringing a registered trade-mark, is subject to the limitation that it be not used in a manner tending to mislead, and that it be clearly made to appear that the articles sold therewith are his, and not those of the registrant.

3. COURTS ⟹292—FEDERAL COURTS—JURISDICTION—TRADE-MARKS—UNFAIR COMPETITION.

A federal court has no jurisdiction of suit for unfair competition alone, in the absence of diversity of citizenship, and so in a suit, jurisdiction of which depends solely on it being for infringement of registered trade-mark, recovery can be had for only such unfair competition as is a part of the same transaction as the infringement; that is, that subsequent to notice of infringement, necessary under Trade-Mark Act, § 28 (Comp. St. § 9514), for recovery for infringement, where notice of registration is not given on the mark.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit by the Stark Bros. Nurseries & Orchards Company against William P. Stark and others. Decree for plaintiff (248 Fed. 154), and defendants appeal. Modified.

The appellee instituted this action to enjoin the appellants from infringing its registered trade-mark and from unfair competition, with the usual prayer for damages and an accounting of profits. The appellee is a corporation existing under the laws of the state of Missouri, and the appellants, defendants in the court below, are citizens of the same state; the jurisdiction of the court having been invoked upon the sole ground of the registration of the trade-mark under the act of Congress of February 20, 1905, and the amendments thereto (Comp. St. §§ 9485, 9487–9511, 9513–9516).

The complaint charges that the plaintiff now is, and has been since the year 1816, including its predecessors, James Stark, William Stark, Stark & Barnett, Stark & Co., and Stark Bros. Nurseries Company, engaged in the business of propagating, buying, and selling fruit trees and other nursery stock, and ever since 1893 marked them with the words "Stark Trees" as its trade-mark, affixing it to boxes or packages containing its product; that it has incurred great expense in propagating trees and advertising them as "Stark Trees," and that this trade-mark has become widely known in this and many foreign countries, as indicating a superior grade of trees propagated and sold by the plaintiff and its predecessors: that its fruit trees are invariably bought and sold and commonly designated as "Stark Trees"; that on January 9, 1913, it filed in the United States Patent Office an application for registration of its said trade-mark "Stark Trees" in accordance with the act of Congress of February 20, 1905, and its amendments, and on June 24, 1913, it was duly registered in the United States Patent Office as registration No. 92,282: that it claims the exclusive right to the trade-mark "Stark Trees," or the word "Stark," on fruit and ornamental trees, the trade-name which has always been claimed by its predecessors, they being the first to adopt this mark for nursery stock; that in the spring of 1913 they found sales of fruit trees, labeled and marked with the words "William P. Stark Nurseries," said words being printed across the representation of a short, bushy tree, so arranged that the word "Stark" appeared in large prominent letters across the picture of the tree, and the other words in comparatively smaller type, which, upon investigation, it found was marked and sold by the defendants; that defendants well knew of the exclusive use claimed by plaintiff of the trade-mark "Stark Trees," or any simulation thereof, and that they used the trade-mark "Stark," in conjunction with the representation of a tree, with the intent to defraud and deceive, and have caused their stock to be bought as and for the nursery stock of the plaintiff, much to plaintiff's loss and injury to the public, and the infringement of plaintiff's registered trade-mark, and of its trade-mark rights under the law; that defendants were duly notified of their infringement, but continued to do so since then; that William P. Stark, one of the defendants, was for a number of years an employé, officer, and stockholder of plaintiff, during which time he attempted to and did familiarize his personal name to readers of the plaintiff's general advertising; that defendants in 1912 established a nursery business, with the principal office at Louisiana, Mo., the home of plaintiff and its predecessors, causing a confusion of mails, which ceased when, by order of the Postmaster General, all mail addressed to the name of "Stark" should be delivered to the plaintiff, whereupon the defendants moved their nurseries to Chester, Mo., and caused the name of the town and post office of Chester to be changed to "Stark City," in face of the fact that for years prior thereto the plaintiff had extensively advertised its addresses at "Stark," "Starkdale," and "Stark Station," Mo.; that all the offices of the defendants are at Neosho, Mo., about 10 miles from Stark City, while all their advertising prominently bears the address "Stark City," causing much annoyance and confusion to the plaintiff; that defendants in their extensive advertising dwelt upon the fact that the name of "Stark" had for nearly a century been associated with the nursery business of America,

and that for the last quarter of a century the defendant, William P. Stark, has made the name a sort of a trade-mark in big things in nursery work, and that their nursery at Stark City would continue to broaden the "Stark" nursery business; that the business of plaintiff and its reputation and the name of "Stark Trees" had been built up at great labor and expense, employing 5,000 salesmen.

The defendants in their answer deny most of the material allegations, and state that the first notification of the claim of the plaintiff to the trade-mark was in a letter received from it, dated August 26, 1916, many years after they had used the name "Stark" in connection with their business, and deny that they had any knowledge of appellee's claim to the exclusive right to the use of the trade-mark "Stark Trees" until notified by that letter. They deny any intent to defraud, or that appellee has suffered any loss by reason of their acts. They deny that the exclusive right to the trade-mark "Stark Trees," or the word "Stark," on fruit and ornamental trees, has been and is now claimed by plaintiff and its predecessors, or that plaintiff and its predecessors were the first to adopt and use this trade-mark for nursery stock, and, if it did, they had no knowledge of it until they received the letter of August 26, 1916. They deny that, at the time the name of Chester was changed to Stark City, plaintiff was using the address "Stark," "Starkdale," or "Stark Station," Mo.; that for years prior thereto it had not used any of these names, nor had there ever been a post office named "Stark," "Starkdale," or "Stark Station," Mo. They admit that they had advertised the location of their nurseries at Stark City, where they are in fact located, and their offices at Neosho, Mo., and that the defendant William P. Stark had for over a quarter of a century been associated with plaintiff's nursery work. They claim that there can be no confusion, as all their sales are made by catalogues and advertisements, and none by traveling salesmen, while the plaintiff did most, if not all, of its business through traveling salesmen, and emphasized in its advertisements that it was located in Louisiana, Mo., while defendants in all their advertisements and catalogues emphasizzed the location of their nurseries at Stark City; that in all their advertisements, letters, and catalogues they had taken precautions to refrain from disparaging the plaintiff or its products, and that their competition had been fair and open.

Upon final hearing there was a decree in favor of the plaintiff, enjoining defendants from the direct or indirect use of the infringing label, or any colorable imitation of plaintiff's trade-mark, in suit, and from putting the work "Stark" prominently at the top of its label, or elsewhere in connection with the business of producing, advertising, and selling nursery stock, in such manner as will not unmistakably differentiate their goods from those of the complainant, and from using the name or address of "Stark City" upon their labels or tags attached to nursery stock, or packages containing same, or from using the address "Stark City" in advertising their business. The decree also directed a reference to a special master to determine all gains and profits which the defendants have derived by infringing on plaintiff's trade-mark, beginning with the 11th day of March, 1914, and that the plaintiff also recover from the defendants all damages which it has sustained by reason of the defendants' infringement and unfair competition from and after the 26th day of August, 1916, on which date plaintiff gave notice to defendant of the registration of its said trade-mark. 248 Fed. 154. To reverse this decree, appellants are prosecuting this appeal.

Xenophon P. Wilfley, of St. Louis, Mo., and Eugene Pearson, of Louisiana, Mo. (O. L. Cravens, of Neosho, Mo., Ras Pearson, of Louisiana, Mo., and Wilfley, McIntyre, Nardin & Nelson, of St. Louis, Mo., on the brief), for appellants.

Andrew B. Remick, of St. Louis, Mo. (John W. Matson, of Louisiana, Mo., on the brief), for appellee.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). [1] It is undisputed that the appellee and its predecessors have used the name "Stark" in their nursery business for a century and that its products have an established reputation for quality. On June 24, 1913, it was granted a registration of the trade-mark "Stark Trees" under the 10-year clause of section 5 of the Trade-Mark Act of Congress of February 20, 1905 (33 Stat. 725, c. 592), as amended by the Act of February 18, 1911 (36 Stat. 918, c. 113; section 9490, U. S. Comp. Stat. 1916). That trade-mark consisted of the two words "Stark Trees," as shown by this photographic copy:

The appellants' device, charged as the infringement, is on a narrow tag of wood, as shown by this photographic copy:

The word "Stark" is in white letters, across the dark bushy tree; the other words are in black, on white ground. It will be noticed that the word "Stark," across the bushy tree, is in larger letters than any of the other words, which are in smaller type. We concur in the finding of the learned trial judge that "in this manner the word "Stark" is given special emphasis, and from its position the term 'Stark Trees' is vividly suggested."

To justify a finding of infringement of a trade-mark, it is not necessary that the similitude should be exact. It is sufficient if, taking into account resemblance and conditions, the former are so marked that an ordinary purchaser is likely to be deceived thereby. McLean v. Fleming, 96 U. S. 245, 251, 24 L. Ed. 828; Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 24, 34, 104 C. C. A. 464, 474; McDonald & Morrison Mfg. Co. v. Mueller Mfg. Co., 183 Fed. 972, 974, 106 C. C. A. 312; Heileman Brewing Co. v. Independent Brewing Co., 191 Fed. 489, 494, 112 C. C. A. 133, 138; De Voe Snuff Co. v. Wolff, 206 Fed. 420, 423, 124 C. C. A. 302, 305; O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 614, 158 C. C. A. 37, 42. In Thaddeus Davids Co. v. Davids, 233 U. S. 461, 469, 34 Sup. Ct. 648, 651 (58 L. Ed. 1046, Ann. Cas. 1915B, 322), it was claimed that "the protection is limited to its use when standing alone * * * and that there can be no infringement unless it is used in this precise manner." The court, in denying this contention, said:

> "The statutory right cannot be so narrowly limited. Not only exact reproduction, but a 'colorable imitation,' is within the statute; otherwise, the trade-mark would be of little avail, as by shrewd simulation it could be appropriated with impunity."

In McDonald & Morrison Mfg. Co. v. Mueller, supra, this court held:

"The test is not whether, when goods are placed side by side, a difference can be recognized in the labels or marks; but the test is, when such goods are not placed side by side, would an ordinarily prudent purchaser be liable to purchase the one, believing that he was purchasing the other."

See, also, Gordon's Dry Gin Co. v. Eddy & Fisher Co. (D. C.) 246 Fed. 954.

There can be no doubt that an ordinarily prudent person, knowing of the reputation of the "Stark Trees," which for many years have been known as superior trees, would easily be induced to purchase the trees of appellants, in view of the advertisements, the statements in their catalogues, and their trade-mark, in the belief that they came from the orchard nurseries of appellee. The catalogues and advertisements of appellants, which do not appear in the printed record, but were by order of the trial court transmitted to this court as a part of the record, and have been carefully examined, indiscriminately describe their trees and nurseries as "Stark Nurseries," "Stark Brothers," "Stark Trees," and use the word "Stark" in connection with their nurseries and alleged location. The representation that the business is located at "Stark City," although they admit that only their nurseries are at Stark City, while the business itself is conducted at Neosho, the change of the name of the place where their nurseries are located from Chester to Stark City, the attempt to establish offices, at first, at Louisiana, Mo., all tend to impress one that there was an intention to add to the confusion and mislead purchasers of trees into the belief that their trees are those of appellee.

[2] Nor does it matter that appellants were using their own surnames as their trade-mark. While it is true that a person has a right to use his surname as a mark, without being guilty of an infringement, there is a limitation to that right. As stated in the Davids Case, "provided that the name was not used in a manner tending to mislead, and it was clearly made to appear that the goods were his own, and not those of the registrant." The decree complained of only enjoined appellants from using labels with their name "Stark" in such a manner "as will not unmistakably differentiate their goods and advertisements from those of complainant." There is nothing in Stix, Baer & Fuller Dry Goods Co. v. American Piano Co., 211 Fed. 271, 127 C. C. A. 639, which in any wise conflicts with this. Although that was not a registered trade-mark case, it was held:

"If, however, the name has previously become well-known in trade, the second comer uses it subject to three important restrictions: (1) He may not affirmatively do anything to cause the public to believe that his article is made by the first manufacturer. (2) He must exercise reasonable care to prevent the public from so believing. (3) He must exercise reasonable care to prevent the public from believing that he is the successor in business of the first manufacturer."

There is nothing in the decree to prevent appellants from using their surnames, nor from publishing in their catalogues and advertisements the training and knowledge of appellant William P. Stark in the nursery business. But the language employed in this part of the decree is in such general terms that appellants may be at a loss how to comply with the terms of the decree in every respect, and thus

may inadvertently violate the injunction. To avoid this we deem it best, following the rule in the Hall Safe Case, 208 U. S. 560, 28 Sup. Ct. 350, 52 L. Ed. 616, and the Knabe Piano Case, 211 Fed. 271, 127 C. C. A. 639, to indicate in this opinion the decree to be entered on this branch of the case.

Nor is it material that appellants do not use appellee's trade-mark in its entirety, if what they do use is misleading and likely to cause confusion, whether the goods offered under this trade-mark are or are not those of the registrant. In Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 33, 21 Sup. Ct. 7, 12 (45 L. Ed. 60), it was held:

"It is not necessary, to constitute an infringement, that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article."

In Ammon & Person v. Narragansett Dairy Co. (D. C.) 252 Fed. 276, 278, the registered trade-mark of plaintiff was "Queen of the West," and that of the defendant "Queen." The court in granting an injunction against the defendant, from using the trade-mark "Queen" said:

"The unnecessary adoption of a part of a plaintiff's trade-mark—a part so substantial as to have become a trade-name or nickname for the goods—is generally regarded as an infringement. The use by a defendant of a trade-mark identical with the name which has been derived from a plaintiff's trade-mark proper, and has become sufficiently descriptive of plaintiff's goods, is the adoption of a mark which will cause its goods to bear the same name in the market. Neither subtractions from nor additions to a trade-mark proper will avoid infringement, when such imitation as is likely to lead to confusion still remains despite the changes"

—and authorities cited. The same principle was announced by this court in Rossman v. Garnier, 211 Fed. 401, 406, 128 C. C. A. 73, 78.

The use of "Stark City" as their address, when their business is conducted at another city, Neosho, Mo., is misleading, and, owing to the name, likely to cause confusion. This is true, not merely owing to the name "Stark" being used, but also for the reason that appellee and its predecessors have frequently advertised their business as at "Stark," "Starkdale," and "Stark Station," Mo., having at some time maintained nurseries at some of these places.

The court committed no error in granting the injunction, but, in order to avoid any misapprehension, there should be added to that part of the decree granting the perpetual injunction the following words:

"That the defendants may use their surnames in circulars, catalogues, or advertisements, but they must be accompanied by information that they are not of the original William Stark Nurseries, nor in any wise connected with the Stark Bros. Nurseries & Orchards Company, or any of its predecessors under whatsoever name their business was conducted, and that their trees are not the product of any of these concerns, nor their successors. It is further ordered and decreed that, for the purpose of distinguishing defendants' trees from those of the complainant, the defendants shall insert in their circulars, catalogues, and advertisements a notice substantially as follows, and in form as conspicuous as the body of such circulars, catalogues, or advertisements:

"Notice.

"The 'Stark Trees' have been the product of the nursery business of the Stark family since the year 1816, and this nursery is still carried on by successors of the original Stark family at Louisiana, Missouri; that William P. Stark, is a member of that family and was connected for over twenty-five years with, and learned the business from, successors of the original Starks; that our business is conducted at Neosho, Missouri, and has no connection whatever with the nursery business of the Stark Bros. Nurseries & Orchards Company, at Louisiana, Missouri."

[3] But we are of the opinion that there was error in decreeing that appellee recover all gains and profits which appellants have derived or received by reason of the infringement of appellee's trade-mark, beginning March 11, 1914.

Section 28 of the Trade-Mark Act of February 20, 1905, 33 Stat. 730 (section 9514, U. S. Comp. St. 1916), after prescribing that notice of the registration of the mark be given by affixing on the mark or label the words "Reg. U. S. Pat. Off." which was not done by appellee, provides:

"And in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice."

As no notice was given by appellee to appellants of infringement of the registered trade-mark, although the words required by the statute were not printed on its trade-mark labels, until a few days before the institution of this action, no damages under this act can be recovered for an infringement of the registered trade-mark before that time in this action. The trial court in its decree limited the damages for infringing the trade-mark to that time, but as to the gains and profits held that the appellants are chargeable for unfair competition from March 11, 1914, when appellee had first complained that appellants' advertising matter constituted unfair competition.

As the jurisdiction of the court below depended solely on the fact that there was a federal question by reason of the registration of the trade-mark under the act of Congress, there being no diversity of citizenship, there can be no liability on the charge of unfair competition prior to the notice under the Trade-Mark Act. To entitle one to recover in such a case, the unfair competition must be a part of the same transaction, to wit, a violation of the act of Congress, and liability thereunder. It must be an aggravation of the infringement of the registered trade-mark, to give the court jurisdiction to award damages. A. Leschen Co. v. Bascom Co., 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710; Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 460, 31 Sup. Ct. 456, 55 L. Ed. 536; T. B. Wood's Sons Co. v. Valley Iron Works (C. C.) 166 Fed. 770; Ross v. H. S. Geer Co. (C. C.) 188 Fed. 731, 734; Electric Boat Co. v. Lake Torpedo Boat Co. (D. C.) 215 Fed. 377; Planten v. Gedney, 224 Fed. 382, 386, 140 C. C. A. 68, 72; U. S. Bolt Co. v. Kroncke Hardware Co., 234 Fed. 868, 148 C. C. A. 466; Mallinson v. Ryan (D. C.) 242 Fed. 951.

In the case at bar the unfair competition only became a part of the same transaction as the infringement of the registered trade-mark, after the notice had been given, as appellee's trade-mark labels had not the words required by the act of Congress on them: "Reg. U. S. Patent Office." Had no notice been given by appellee, it could not have recovered any damages. This was expressly decided by this court in Rossmann v. Garnier, 211 Fed. 401, 407, 128 C. C. A. 73, 79.

None of the authorities relied on by counsel for appellee is in point. In Jacoway v. Young, 228 Fed. 630, 143 C. C. A. 152, the infringed trade-mark label had printed on it the words "Registered U. S. Patent Office," therefore that was notice. Ludwigs v. Payson Mfg. Co., 206 Fed. 60, 124 C. C. A. 194, and Detroit Show Case Co. v. Kawneer Mfg. Co., 250 Fed. 235, 162 C. C. A. 370, were actions for infringement of patents, and it was held that a claim for unfair competition in connection with the sale of the infringing article, may properly be joined. But see Geneva Furniture Co. v. Karpen, 238 U. S. 254, 259, 35 Sup. Ct. 788, 59 L. Ed. 1295. Shrauger & Johnson v. Phillip Bernard Co. (D. C.) 240 Fed. 131, decided by Judge Wade, not only fails to sustain counsel's contention, but is an authority to the contrary. While Judge Wade makes the statement quoted by counsel for appellee, he proceeds:

> "In certain cases, where there was combined the charge of infringement, and also unfair competition, courts have held that, even though the claim of infringement was decided in favor of the defendant, the court still could retain jurisdiction upon the question of unfair competition; but the large majority of the cases are the other way."

After reviewing a large number of authorities, he holds:

> "If a bill presented two separate counts, stating two separate and independent causes of action, one for a patent infringement, and the other for unfair competition, entirely independent of the infringement, I should hold that the cause of action for unfair competition should be stricken out. The court has no such jurisdiction conferred by statute, and the rule contended for relates rather to the practice of a court of equity, than it does to the jurisdiction of the court."

When the case was at a later day finally heard before Judge Reed, he sustained a motion to dismiss the petition as to the claim for infringing the plaintiff's alleged trade-mark, and for unfair competition for want of jurisdiction. 247 Fed. 547, 550.

Gains and profits made before notice was given under the Trade-Mark Act, in the absence of a label bearing the inscription prescribed by the act of Congress, are independent of the act of Congress, and can only be recovered under the rules established by courts of equity in actions for unfair competition. Such an action cannot be maintained in a national court in the absence of a diversity of citizenship. As was held in Standard Paint Co. v. Trinidad Asphalt Co., supra:

> "The opposite parties to the suit are citizens of different states, and while this diversity of citizenship was not necessary to give the Circuit Court jurisdiction of the case in so far as it involved the validity of the trade-mark, it was necessary to give the court jurisdiction of the issue of unfair competition."

Other questions have been discussed by counsel, and have received our careful consideration, but we do not deem it necessary to pass on them in this cause.

The decree of the court below will be modified, by adding to the injunction clause the words hereinbefore set forth, and that the appellants be charged with the gains and profits made by them by reason of the unfair competition arising from the infringement of appellee's registered trade-mark, and the damages, if any, which appellee has sustained by reason thereof since the beginning of this action.

The costs of this appeal will be taxed, two-thirds to the appellants and one-third to the appellee.

(257 Fed. 17)

BALBAS v. UNITED STATES et al.

(Circuit Court of Appeals, First Circuit. April 5, 1919.)

No. 1342.

1. CRIMINAL LAW ⟹1129(1)—APPEAL—ERRORS ON FACE OF RECORD.
The Circuit Court of Appeals, in the exercise of its discretion, may notice a plain error on the face of the record in a criminal case, although not assigned.

2. INDICTMENT AND INFORMATION ⟹125(19)—DUPLICITY—ESPIONAGE ACT.
An indictment under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), alleging in one count that accused had caused and attempted to cause insubordination, etc., was not duplicitous, simply alleging two modes of committing one offense, especially in view of Rev. St. § 1024 (Comp. St. § 1690), relating to joinder of counts.

3. WAR ⟹4—ESPIONAGE ACT—ELEMENTS OF OFFENSE.
An indictment under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), charging the commission of the first offense set out therein, willfully making or conveying "false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies," must allege that statements made by defendant were false and willfully made.

4. WAR ⟹4—ESPIONAGE ACT—ELEMENTS OF OFFENSE.
An indictment charging a publisher with the commission of the second and third offenses set out in Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), need only allege that publications caused or were an attempt to cause insubordination, etc., or that they obstructed the enlistment or recruiting service of the United States, and that they were willfully made with such intent; it being immaterial whether statements in the articles were false or not.

5. WAR ⟹4—ESPIONAGE ACT—INDICTMENT.
Under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), where articles published by defendant were set forth at length in indictment, it was not necessary to specify particular statements in them by which it was alleged the defendant committed the offense with which he was charged.

6. INDICTMENT AND INFORMATION ⟹140(1), 150—SUFFICIENCY OF INDICTMENT—QUESTION FOR COURT.
In a prosecution under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), whether language used by defendant in newspaper articles was apparently adapted to create an offense became, on demurrer and a motion to quash, a question for the court.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

7. WAR ⟹4—ESPIONAGE ACT.

A newspaper article, disclosing that the defendant, the publisher, as one of 288 residents of Porto Rico who had declined American citizenship, was opposing what he regarded as an unwarranted application of Selective Service Act (Comp. St. 1918, §§ 2019a, 2019b, 2044a–2044k) to them, *held* insufficient to show that defendant by its publication caused or attempted to cause insubordination, mutiny, disloyalty, and refusal of duty, or obstructed the enlistment or recruiting service of the United States, or that he intended so to do, under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c).

8. WAR ⟹4—ESPIONAGE ACT—INDICTMENT—SUFFICIENCY.

A newspaper article, complaining of Selective Service Act (Comp. St. 1918, §§ 2019a, 2019b, 2044a–2044k), or constructions thereof by the provost marshal of the United States, *held* not so apparently free from language adapted or calculated to create insubordination, etc., or to obstruct the enlistment or recruiting service with the intent, etc., that court could have sustained a demurrer to counts of an indictment setting it forth as a violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c).

9. CRIMINAL LAW ⟹371(1)—ESPIONAGE ACT—PUBLICATIONS—EVIDENCE—PRIOR PUBLICATIONS.

In a prosecution under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), where the intent of the defendant by publication to commit the offense of causing or attempting to cause insubordination, etc., was one of the issues submitted to the jury, publications of the defendant in earlier issues of his paper were admissible in evidence to show that defendant had no unlawful intent.

10. WAR ⟹4—ESPIONAGE ACT—PUBLISHING ARTICLES TO CAUSE INSUBORDINATION AND OBSTRUCT ENLISTMENT—ELEMENTS.

In a prosecution under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), it was not only necessary to prove beyond a reasonable doubt that the defendant willfully published newspaper articles with the intent to cause insubordination, etc., or to obstruct the enlistment and recruiting service, but also that this intent had been carried into effect by language adapted to produce these results.

11. WAR ⟹4—ESPIONAGE ACT.

Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), in referring to the influencing and disloyalty, etc., in the military forces of the United States, should not be construed so broadly as to include the influencing of all the able-bodied men in Porto Rico, especially those who had renounced American citizenship, whether they were within the class who were obliged to register or not.

12. WAR ⟹4—ESPIONAGE ACT—SUFFICIENCY OF EVIDENCE.

In a prosecution under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), evidence *held* insufficient to sustain a finding that defendant published newspaper articles willfully, with the intent to create insubordination, mutiny, etc., or obstruct the recruiting or enlistment service of the United States.

Appeal from the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Vincente Balbas Capo was convicted of a violation of the Espionage Act, and he brings error. Reversed and remanded.

Boyd B. Jones, of Boston, Mass. (Henry G. Molina, of San Juan, Porto Rico, on the brief), for plaintiff in error.

Thomas J. Boynton, U. S. Atty., of Boston, Mass. (Alonzo H. Garcelon, Sp. Asst. U. S. Atty., of Boston, Mass., on the brief), for defendants in error.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

JOHNSON, Circuit Judge. This is a writ of error to review a final judgment of the district court of Porto Rico, imposing a fine of $1,000 and imprisonment for the term of two years upon the defendant below, upon each of four counts in an indictment in which the defendant was charged with violation of title 1, § 3, Act of June 15, 1917, c. 30, 40 Stat. 219 (Comp. St. 1918, § 10212c), known as the Espionage Act.

There were six counts in the indictment. In the first and fourth counts the defendant below was charged with having committed the offense created by the first clause in the Espionage Act, viz.: The willfully making or conveying false statements with intent to interfere with the operation and success of the military and naval forces of the United States, to the injury of the United States. The fourth count was quashed upon motion of the defendant, and the jury returned a verdict of not guilty upon the first.

In the remaining four counts he was charged with committing the second and third offenses created by the following clauses in the act:

"And whoever, when the United States is at war, shall willfully cause, or attempt to cause, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, * * * shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

In the second count he was charged with having committed the offense of causing and attempting to cause insubordination, etc., by "unlawfully, willfully, knowingly and feloniously publishing" in a certain paper or periodical, known as the "Heraldo de las Antillas," in the city of San Juan, Porto Rico, on or about the 27th day of October, 1917, certain false statements in the Spanish language, the English translation of which is as follows:

"Recruiting in Porto Rico.

"According to recent notices, the quota of recruits of Porto Rico which had been fixed at 12,000 men has been increased to 17,000, of which the first ones will be white and the rest colored.

"It is said that the recruiting will begin within the first ten days of November next.

"We understand that Porto Rico contributes to the National Army proportionally a larger number of soldiers than any other state in the Union, and larger than any other territory, as, for instance, Hawaii, which does not contribute any.

"What do the politicians say to that, who attribute to themselves the monopoly of the defense of the people's interests?

"They say nothing.

"They are busy defending some positions that they have paid for."

It was alleged in said count that—

"The object and intent of the said words made, published and conveyed as aforesaid was to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, * * * against the peace and dignity of the United States."

In the third count it was charged that he did—

"willfully, unlawfully, knowingly, and feloniously obstruct the recruiting and enlistment service of the United States, to the injury of said service and to the injury of the United States," by the same publication; and that "the object and intent of said words * * * was to obstruct the registration and enlistment in the service of the United States."

In the fifth count he was charged with having committed the offense with which he was charged in the second count, by the publication in the same paper, on or about the 10th day of November, 1917, of an editorial entitled "The Topic of the Day."

In the sixth count he was charged with having committed the offense with which he was charged in the third count, by publishing the same editorial. This was printed in the English language, and is set out in full in the indictment. It is too long to be quoted at length, and we will therefore quote only the material parts and state the substance of the rest. It began with the following quotation from another newspaper published in Porto Rico:

"The Topic of the Day.

"The Prevost Marshall of the United States has decided that the Porto Ricans who have declined American citizenship are obliged to serve in the Army." La Democracia.

The writer then discussed this reported decision of the provost marshal:

"Just as it sounds, the above statement is exactly this: 'The Prevost Marshall has decided.' So that had the Prevost Marshall decided, contrarily, those who have not sworn American citizenship would not have been called to the 'colors'—or what has the same effect but in different words—that what one man decided is to be law for 288 men. * * *

"With due deference to La Democracia, the Prevost Marshall has not the power to decide which affects man's conscience. * * *

"The law reads that all citizens of the United States are obliged to active service, to take up arms; but it does not refer to those who are not American citizens. And should that law enact such a step, it would be nothing less than a law without foundation, because may La Democracia know, that Porto Ricans those who have not sworn allegiance to the American flag, we constitute a people of Porto Rico, as an entity about to disappear, may be, but not as yet extinguished. * * *

"The people of Porto Rico has not declared war on any nation whatsoever and is therefore neutral. The above may sound awkward, but let it be known as a fact to all Porto Ricans, those who are now citizens of the United States, that Congress provided you with that citizenship in order that you be obliged to take up arms in defense of the American flag, without which privilege human conscience would have been violated had you been enlisted.

"It is logical, therefore, that in order that Porto Ricans be called to shed their blood for the American flag, they were given American citizenship, it is reasonable that those who have not sworn flag are not compelled to defend another but the flag of Porto Rico; that flag, that flies yet as the moral representation and symbol of the people of Porto Rico, who yet exists as a political body. * * * The flag does not wave lawfully over the castles of Porto Rico; but lives there—in the hearts of every Porto Rican, * * * those who have not sworn American citizenship. * * * No matter how powerful the foe may be, only for that dear flag would the sacrifice be offered.

"How little does it matter that the Prevost Marshall decides that the citizens of Porto Rico have to fight for the American flag—how little does he know that physical strength is not all!!! The flag of a fatherland needs more

for its defense—it needs the spiritual embodiment of heart and soul that there may be strength, true force, to be able to strike the death blow to the enemy and proclaim victory."

The author then discussed the danger of a nation obliging men "as slaves to defend a cause for which they have no ideal," and states that it "sounds impossible that the Prevost Marshall could decide to engross the American army with men whose ideals are not the same as those of Americans," and that the people of Porto Rico, whom he calls "the Pariah," as the legal definition of a citizen of Porto Rico who has not changed his status, is neutral in this terrible war; that the Pariahs form a lawful entity, who have no governing power, and who have been compelled to allow themselves to be governed by others. Fate is appealed to behold them—

"weak and powerless, driven by force!!! That all has been decided by the Prevost Marshall, but he who thus decided, who thus presses on the defenseless and the weak, he who compels, based on might, that man be driven by force to fight for a flag that is not his own, he who thus drives man has no right to claim that man be a true, loyal soldier."

The defendant then stated his position and advice that he had given to those who like himself had declined American citizenship, under the provisions of the Act of Congress of March 2, 1917, c. 145, § 5, 39 Stat. 953 (Comp. St. 1918, § 3803bb):

"As soon as the statement of La Democracia was known, although no explanation of the decision of the Prevost Marshall was given, we, who have been so interested in the affair, have been the object of numerous inquiries on the matter from Pariahs all over the island and to one and all the same answer and information has been given:

"Resistance against the mighty is of no avail—when—ever called to the front—we have to go—but never before solemnly expressing to the Military Commission *that we are not citizens of the United States;* that we are not ready and willing to swear loyalty to the American flag—but if nevertheless we are compelled to defend a flag, to which respect is due, but with which we have no moral ties nor progeny—let the Prevost Marshall's will be done! His and only his will the responsibilities be of human error. And then may be that that decision find a place in the pages of history more due to its effects than to the motives of its existence. * * *

"Oh! Washington, be thou witness of this struggle; behold man's conscience trampled upon by Might; * * * behold the Statue of Liberty and the Right of Man cast to the winds in fragments."

The writer then reasons that, because the Pariah has been called upon to perform the same duties as citizens of the United States, his condition as a citizen "is equally esteemed and appreciated as that of President Wilson, inasmuch as the Pariah has been assigned the same and equal duties as those assigned to the President's fellow citizens," and therefore that the Pariahs are placed upon equal grounds and authorized to discuss as equals.

The defendant attacked the indictment by demurrer and a motion to quash on the following grounds: That the counts were improperly joined; that it did not set forth or allege the specific statements alleged to be false; that it did not set forth in any of its counts an offense known to the law or any violation of section 3 of the Espionage Act.

The demurrer was overruled and the motion to quash was denied,

except as to the fourth count, to which the defendant seasonably excepted. At the close of all the testimony the defendant filed a motion that the court direct a verdict of not guilty, and to the denial of this motion he seasonably excepted. The defendant also seasonably excepted to certain instructions of the presiding judge and the admission and exclusion of certain evidence, and has assigned these instructions and the rulings admitting or excluding this testimony as error. In addition, counsel for the defendant claimed in argument that the second and fifth counts were bad for duplicity, because the offenses of causing insubordination, etc., and attempting to cause insubordination, etc., are alleged in each of them, and that these are separate offenses, as shown by the disjunctive "or" in the statute; that while this objection was not urged at the trial, and is not made a part of the bill of exceptions, the error is apparent on the face of the record, and the court should take notice of it, although not assigned.

[1, 2] It is undoubtedly true that the court, in the exercise of its discretion, may notice a plain error on the face of the record, although not assigned: but we do not think the indictment is open to the charge of duplicity. Only one offense is alleged, which may be committed in two modes, and both of these modes are joined in one count. Either causing insubordination, etc., or the attempt, are different modes of committing one and the same offense and both may be alleged in one count. Crain v. United States, 162 U. S. 625, 634, 16 Sup. Ct. 952, 40 L. Ed. 1097; May v. United States, 199 Fed. 53, 117 C. C. A. 431; United States v. Dembrowski (D. C.) 252 Fed. 894.

The joinder of counts which the defendant assigns as error is authorized by section 1024 of the Revised Statutes (Comp. St. § 1690) and is fully sustained in Pointer v. United States, 151 U. S. 396, 400, 14 Sup. Ct. 410, 38 L. Ed. 208, and Ingraham v. United States, 155 U. S. 434, 15 Sup. Ct. 148, 39 L. Ed. 213.

[3, 4] As the indictment was drawn, there was an attempt to charge, in the first and fourth counts, the commission of the first offense set out in section 3; that of—

"willfully making or conveying false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies."

It was necessary to allege in these counts that the statements made by the defendant were false and willfully made. As to the last two offenses in the section, set out in the remaining counts, it is immaterial whether the statements made by the defendant were false or not; it was only necessary to allege that they caused, or were an attempt to cause, insubordination, etc., or that they obstructed the enlistment or recruiting service of the United States, and that they were willfully made with such intent.

[5] The articles published by the defendant were set forth at length, and it was not necessary to specify the particular statements in them by which it was alleged the defendant committed the offenses with which he was charged. Their language requires no expert knowledge for its interpretation, and no explanation was necessary by way of innuendo to make its meaning clear. Lockhart v. United States, 250

Fed. 610, 162 C. C. A. 626; Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162.

[6] We think the offenses were set out in the indictment with such precision and exactness as to fully acquaint the defendant with the crimes with which he was charged. Whether the language which the defendant used was apparently adapted to create these offenses became, on demurrer and a motion to quash, a question for the court.

[7] The article of November 10th discloses that the defendant, as one of 288 residents of Porto Rico who had declined American citizenship, was opposing, as he was justified in doing, what he regarded as an unwarranted application of the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2019a, 2019b, 2044a–2044k) to them. We do not think its language is adapted or calculated to effect the results which it was charged the defendant willfully intended. It is clearly only a justifiable criticism of the reported decision of a subordinate officer of the government by one who was directly affected by it, and we do not think that any inferences could reasonably or fairly be drawn from it which would justify a jury in finding that the defendant, by its publication caused, or attempted to cause, insubordination, mutiny, disloyalty, and refusal of duty, or obstructed the enlistment or recruiting service of the United States, or that he intended so to do, but that it discloses upon its face that his only purpose in publishing it was to oppose a reported decision by which those who had declined American citizenship would be forced to serve in the army of the United States. We think, therefore, the demurrer should have been sustained as to the counts which were based upon this publication.

[8] It is not so apparent from the language of the article of October 27th that it is not adapted or calculated to create the offenses alleged, or that there was an absence of willful intent, that the court could have ruled that there was no possible question for the jury in the determination of both the adaptability of its language to create insubordination, etc., or to obstruct the enlistment or recruiting service and the intent with which it was published, and we think the demurrer was properly overruled as to the counts based on this article.

The defendant assigned as error that the court refused to admit as evidence in his behalf an article under date of April 2, 1917, published by him in his paper, the "Heraldo de las Antillas," entitled "War," the material part of which is as follows:

"If Congress should enact—which would not be strange—compulsory service, which has been adopted in advance already by some states in the Union, then the moral support to be given by Porto Rico to the United States should take the form of soldiers not exempt from service, either by draft or by obligatory recruiting or by voluntary action. It is very natural that this should be so, Porto Rico being as it is already a part of the North American nation, enjoying her citizenship, and with the responsibilities and obligations which go with it. It is not the time to go back before the obligation of honor which has been contracted by all those enjoying American citizenship, and we would not be the persons to counsel disloyalty or treason. Consequently, with our principles of a lifetime, the man who has a flag should defend it with his arm, with everything and all that he is or possesses."

This article was offered by the defendant to show his state of mind and the absence of the intent with which he was charged in publishing the articles of October 27th and November 10th, and was clearly competent for that purpose. The court, however, excluded it, and assigned his reason for its rejection in the following language:

"I have admitted certain articles because they may throw light upon the intention of the defendant in this case. The allegations show that he has acted throughout in a propaganda to secure the independency of Porto Rico, but he gave that up when Congress passed the Jones Act. Now an article is offered which dates after the expiration of that propaganda, and an article—presuming for the moment that it is proper in some respects—that cannot throw any light upon that propaganda, does not come within the scope."

[9] The intent of the defendant to commit the offenses with which he was charged in the indictment was one of the issues submitted to the jury, and, as bearing upon that issue, publications of the defendant in earlier issues of his paper, which, in the exercise of its discretion, the court did not think too remote, were unquestionably competent, and we think the rejection of this article was prejudicial to the defendant.

[10] The defendant has also assigned as error certain instructions to the jury, but we do not find it necessary to consider all of them. The defendant points out the following which he claims is erroneous and which we think is material:

"If you have such a doubt in this case, then the defendant is entitled to it; but if, after considering the facts, you come to the conclusion as a reasonable man that there is one explanation, and one only, for what he did, and that is that he is guilty, that he did this intentionally, then you find him guilty."

We have looked at other parts of the charge to ascertain if the elements of the offenses with which the defendant was charged were clearly set forth, so that the instruction complained of, although erroneous, might be held not to have been prejudicial to him; but throughout the charge the presiding judge nowhere submitted to the jury the question whether the language of the statements was adapted to produce the results with which the defendant was charged. In summing up the elements necessary to constitute the offenses he stated to the jury:

"The principal ones are that he wrote these articles; that the first was false; as to the second, falsity is not necessary; that he published these articles in the way of which we have gone over, and that he did so willfully; that is to say, with an evil intent, not for the purpose of enlightening the public as to their rights and duties, but to interfere with the recruiting and enlistment of the military forces of the United States, and that he did it intentionally, intending to interfere and produce these different results."

In other parts of the charge the following instructions were given, to which the defendant seasonably excepted:

"He is indicted for publishing an article or articles with the intent that these articles would influence the different steps in raising the military forces, so that you do not have to go very far down the line to find out the elements of the case. You do not have to prove that the actual result of these articles was to interfere with the military forces; if the defendant published them with the intent to do that, then everything else follows; and that is what you will have to determine. * * *

"In other words, the freedom of the press is not a defense, if you think the defendant has done these things willfully and with the intent to obstruct the recruiting and enlistment of the military forces of the United States. * * *"

It was not only necessary to prove beyond a reasonable doubt that the defendant willfully published these articles with the intent to cause insubordination, etc., and to obstruct the enlistment and recruiting service, but that this intent had been carried into effect by language adapted to produce these results.

The emphasis which was laid by the court upon the necessity of finding the intent of the defendant and the direction of the inquiry of the jury to the determination of this, to the exclusion of any consideration of whether the language of the articles was calculated or could reasonably be held to be adapted to cause insubordination, etc., or obstruct enlistment or the recruiting service, and failure to instruct the jury that, whatever the intent of the defendant, it was necessary that they should find that it was coupled with some act or words adapted to carry it into effect, removed from their consideration the principal element of the offenses with which the defendant was charged.

[11] The defendant also excepted to this instruction and assigns the same as error:

"The indictment does not mean that it is necessary for you to find that this was intended to affect the troops in Cayey, Panama, or anywhere else. The act refers to the influencing and the disloyalty, etc., in the 'military forces' of the United States, and the military forces of the United States means the able-bodied men of the United States, the people from whom the United States may make up its army. It does not even mean those between the ages of 21 and 31 years; it means all able-bodied men of the United States and its territories, including Porto Rico. So, if you find that these articles were intended and are to be construed as affecting able-bodied men of Porto Rico, whether they are registered or not, or whether they are liable under the call, makes no difference; the military forces are the able-bodied men of this island."

The statute is a penal one, and while the military forces of the United States might be construed to include not only those who had been inducted into the military service, but also those who had been required to register under the Selective Service Act and had not been exempted or excused from service, we do not think it could be construed so broadly as to include all the able-bodied men in Porto Rico —the 288 Porto Ricans who had renounced American citizenship among them if they were able bodied—whether they were within the class who were obliged to register or not.

While we think these instructions cannot be sustained and that they were prejudicial to the defendant, we feel also that there was error in denying the motion, made by him at the close of all the testimony, that the jury be instructed to return a verdict of not guilty.

We have examined with great care both statements which the defendant admits he published in his paper, and also the testimony introduced by the government and by the defendant, and we are unable to discover any evidence upon which the finding of the jury, that he willfully published either article with the intent to create insubordination, disloyalty, mutiny, or refusal of duty in the naval or military

forces of the United States, or to obstruct the enlistment or recruiting service of the United States, can be sustained. The only evidence which the jury had before it beside the two articles was the testimony of two employés in the Post Office Department, who testified in regard to the mailing and circulation of the papers in which the articles were contained, which was admitted by the defendant, and the testimony of the adjutant general of Porto Rico, who testified that the article which appeared in the defendant's paper under date of October 27th, entitled "Recruiting in Porto Rico," was not true; that the quota to be furnished from Porto Rico was 12,833, and that he had not at any time received from his superiors any further orders in regard to the quota of men which was to be supplied in Porto Rico; that at the time of the trial no men had been drafted in Hawaii for service, and while the gross quota of men to be supplied by Hawaii for the National Army was 2,403, it had actually furnished 4,397 men. He was shown a copy of "La Correspondencia," a newspaper published in Porto Rico, and admitted that the figures given by that paper in its issue of July 20, 1917, showing the number of men to be furnished by the different states of the Union, Porto Rico, and Hawaii, were correct in accordance with the official records in his office.

The defendant testified that he was born in Porto Rico; that he served in the Spanish War upon the side of Spain, and that after the treaty of Paris he had opposed compulsory American citizenship for Porto Ricans until the enactment by Congress on March 2, 1917, of legislation conferring citizenship upon residents of that island; that upon March 7th, after the passage of the act, he had declared his intention of not becoming a citizen, in accordance with its provisions that those who did not desire to become American citizens might file a declaration of their rejection of the offer of citizenship in the United States District Court of Porto Rico. In the "Heraldo de las Antillas" of March 20, 1917, he stated his reasons for his action. This article and another in the same paper, under date of March 31, 1917, were admitted in evidence. In these articles the defendant stated that he did not have the attachment for America as a nation to make it proper for him to become an American citizen, and that—

> "To make a display of American citizenship without entertaining a proper feeling of loyalty to the American flag would not only create a disagreeable predicament, but would also constitute the most pronounced betrayal of personal convictions and the most utter disregard of personal decorum."

He also stated in the article of March 20, 1917, that those who have accepted American citizenship—

> "are under positive obligation to be loyal to that citizenship and to that flag."

A publication of the defendant in his paper, under the heading "Topic of the Day," under date of October 13, 1917, was also admitted in evidence, which contains the following statements:

> "According to every indication, the moment is nearing for Porto Rico to begin paying its tribute of blood to the American flag. New instructions have been issued in the daily press—and by the way they are not very clear, thanks to the very poor Spanish in which they are written or translated—

and in such instructions the fact of not being citizens of the United States is also omitted as ground for exemption. * * * There is no doubt, however, that the matter is to be brought very shortly and that it must be solved in one way or another. As for us—we repeat it once and one hundred times—we have no doubt whatever; but it is also known that in these times the least doubtful things seem dark and adulterated. We believe that the citizen of Porto Rico who accepted the citizenship of the United States, inasmuch as he was given six months within which to renounce it, is inevitably bound to take up arms to defend his nation. There was not the least deceit in it, except such difficulties as were interposed by some officials to prevent the renunciation of such citizenship, the period of time fixed by law for the exercise of that right having transpired precisely during the time that the Congress of the United States established compulsory military service and was making preparations to carry the same into practice. * * * Then and now we showed ourselves respectful to the wishes of each and everybody, and now that the time within which to exercise the right of renunciation has more than expired, we must continue to show the same respect; and even from our own standpoint we must acknowledge and proclaim that those Porto Ricans are bound to accept all the consequences of their action as such citizens of the United States. But just as we are of the opinion concerning those who accepted the citizenship of the nation whose flag waves to-day over the castles of our country, we understand, and we shall not tire repeating it until this question shall have been duly determined, that no person who is not a citizen of a nation can be a soldier of that nation unless it is done through an act of force against which it is always lawful to claim as long as such claim is made in a legal way and before the same Congress which provided the right to renounce American citizenship."

These articles show that the defendant had been engaged in a controversy over the desirability of the residents of Porto Rico accepting American citizenship, which was conferred upon them by the Jones Bill, so called, and that after the six months had expired in which citizenship might be renounced under the provisions of the bill, he had been discussing the rights of those who had so renounced the offer of citizenship; that 287 other residents of Porto Rico beside himself had, under the terms of this act, renounced this citizenship; and that, whether he and these 287 associates were subject to the provisions of the Selective Draft Act, was a matter of great interest to him and the subject of discussion through the columns of his paper. The attitude of the defendant toward American citizenship and his published statements in regard to the duty which Porto Ricans owed the American flag who had become American citizens, throw light upon the intent with which the defendant published the articles upon which the indictment against him was found.

The defendant testified that, after the passage of the Jones Bill, he ceased the publication of his paper as a daily on May 17, 1917, and continued its publication as a weekly with the principal object of defending the rights of those who had renounced American citizenship, taking his news from local papers, as his paper had no news service of its own. That, in publishing his article of October 27, 1917, he had before him an article in the issue of October 20, 1917, of the "La Correspondencia," another newspaper published in Porto Rico. This article, entitled "The Draft in Porto Rico," was admitted in evidence. It stated in substance that, according to latest official authorized advices, 17,000 men would be recruited in Porto Rico, instead of 12,000, as had been previously reported, and that it was the purpose of the

government to draft 12,000 white men and 5,000 negroes or colored men; that the latter would be sent immediately to the United States to a suitable cantonment for men of that race, and the 12,000 white men would be trained in Porto Rico; that this had not yet been decided, but that the news in detail would be given soon; and that, if this project was finally adopted, Porto Rico would be contributing many more men than was set at the beginning.

He testified that he had before him, also, in the preparation of his article an article published in the "La Correspondencia" on July 20, 1917, which gave the number of men to be furnished under the draft by each state and territory, and concluded with this statement:

"As may be seen by our readers from the list we are publishing, the quota of Porto Rico, as a blood tax, to be a part of the first National Army, is 12,833 men; that is, it occupies the place designated with No. 22 among all the states and territories, being over 29 states and territories whose quota of men for the defense of the great American nation is much smaller."

While the statements contained in these articles in "La Correspondencia" were incorrect, and that of July 20, 1917, failed to take into consideration that the number of men assigned to the different states was the net number to be drafted after the number who volunteered had been deducted, there was no evidence that the defendant knew such to be the fact or was in any position where it might be said that he should have known the facts. It did appear in this statement that Hawaii would furnish no men, and that Porto Rico would furnish a larger number of men than 29 states and territories, although the population of these states far exceeded that of Porto Rico, on the assumption that Porto Rico would furnish 12,833 men. The article of October 23, 1917, from "La Correspondencia," stated that the draft, from officially authorized advices, would be raised to 17,000 men. These articles were admitted in evidence to meet the charge that the defendant had an evil intent in making the statements with which he was charged. In the light of the evidence afforded by them, we do not think that any construction can be placed upon the article of October 27th that would sustain a finding that it was willfully published with the intent to cause insubordination, etc., or to obstruct the recruiting or enlistment service. It was clearly in the nature of a criticism of the conduct of those who were charged with the duty of protecting the citizens of Porto Rico, and seeing that they were not unfairly discriminated against under the Selective Service Act, because he asks:

"What do the politicians say to that, who attribute to themselves the monopoly of the defense of the people's interests? They say nothing. They are busy defending some positions that they have paid for."

There was no evidence before the jury to show the intent with which the defendant published this article, except the language of the article itself and the testimony of the defendant in regard to the sources of information which he had for it, and this was not only uncontradicted, but was supported by the testimony of the government that the articles in "La Correspondencia" were actually published in that paper, and also the uncontradicted testimony of the defendant in regard to the prior publications in his own paper.

[12] We think there was no evidence to sustain the verdict of the jury that the defendant published either the article of October 27th or that of November 10th willfully, with the intent to create insubordination, mutiny, etc., or to obstruct the recruiting or enlistment service of the United States, and that the defendant's motion to instruct the jury to return a verdict of not guilty should have been granted.

The judgment of the District Court is reversed, the verdict is set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

(257 Fed. 29)

FIRST NAT. BANK OF SWEETWATER, TEX., v. RUST et al.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1919. Rehearing Denied May 9, 1919.)

No. 3300.

1. BANKS AND BANKING ⟹117—CERTIFICATE OF DEPOSIT—ISSUANCE FOR INDIVIDUAL DEBT—RISK OF AUTHORITY.

One to whom a bank's president, in payment of his individual debt, issued its certificate of deposit, accepted with knowledge thereof, took the risk of the president's authority, depending on whether there had been a contemporaneous deposit, as recited in the certificate; the principle that his general powers would give apparent authority not applying, where he is known to be acting in his own interest.

2. BANKS AND BANKING ⟹118—CERTIFICATE OF DEPOSIT—ISSUANCE FOR INDIVIDUAL DEBT—AUTHORITY—BURDEN OF PROOF.

One to whom a bank's president issued its certificate of deposit in payment of his individual debt, accepted with knowledge thereof, seeking to hold the bank thereon, has the burden of proving the making of the recited contemporaneous deposit, necessary for the authority to issue certificate.

3. BANKS AND BANKING ⟹118—CERTIFICATE OF DEPOSIT—EVIDENCE OF DEPOSIT.

A bank's certificate of deposit having been issued by its president in payment of his individual debt, and accepted with knowledge thereof, neither recital in certificate nor statement in letter of president to person receiving the certificate is evidence against bank of deposit having been made, necessary for president's authority to issue certificate.

4. EVIDENCE ⟹244(12)—STATEMENT OF BANK PRESIDENT—PAST TRANSACTION.

Statement of president of bank, to one to whom its certificate of deposit had been issued by its prior president in payment of his individual debt, that its books showed the deposit called for thereby, is not inadmissible against it, in the absence of injury therefrom raising an estoppel; it amounting to an admission that past transactions had occurred and had been evidenced by the bank's books.

Batts, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Texas; Robert T. Ervin, Judge.

Action by Anna Rust and husband against the First National Bank of Sweetwater, Tex. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

J. H. Beall, of Sweetwater, Tex. (Beall & Douthit, of Sweetwater, Tex., and Kirby & King, of Abilene, Tex., on the brief), for plaintiff in error.

R. W. Haynie, of Abilene, Tex. (Woodruff & Woodruff, of Sweetwater, Tex., and Fred Cockrell, of Abilene, Tex., on the brief), for defendants in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The defendant in error Anna Rust brought suit in the District Court on three certificates of deposit, each for $2,000, purporting to have been issued by the plaintiff in error. The certificates were issued July 5, 1915, and were to mature 11 months after date, with 6 per cent. interest. At their maturity the interest was paid, and the certificates were extended for one year from their maturity. Upon presentation for payment, the plaintiff in error denied liability and refused payment, and this suit on them was instituted.

[1] The evidence developed that J. V. W. Holmes was president of the issuing bank at the time it is charged that the certificates were issued by it; that he owed the defendant in error certain land notes, and, being desirous of disposing of the land by which the notes were secured, induced the defendant in error by letter to accept in part payment of the notes, which were not then due, certificates of deposit of the plaintiff in error maturing at the same time the notes matured. The evidence shows that the husband of the defendant in error acted for her in the transaction with Holmes; that he was familiar with Holmes' handwriting, and knew that the certificates sued on were issued in settlement of an individual debt due by Holmes to his wife, and knew that the certificates were signed by Holmes, as president of the plaintiff in error, and that he had no knowledge of the deposit in the bank of the money, called for by the certificates, other than the recital of that fact in the certificates themselves, and in a letter from Holmes to him. The record, therefore, showed indisputably that the defendants in error received the certificates of deposit, knowing that they had been signed and issued by Holmes, and that he had used them in payment of his individual debt, and not in the business of the bank, for which he assumed to act.

The defendants in error, this being true, took the risk, in accepting the certificates, of the authority of Holmes to sign them in its behalf. It is not disputed that it was within his power as president to sign certificates of deposit, when the money was deposited in the bank, as called for by the certificate. He had no actual authority to issue certificates, in the absence of a contemporaneous deposit of the money. His general powers would give him apparent authority, as to persons dealing with the bank, to act for the bank, in the issue of certificates of deposit, in all cases, whether the money was deposited or not. The principle, however, is confined to cases where he was not known to be acting in his own interest, and not in the interest of the bank. If the party dealing with him knew that he

was acting in his own interest in the matter of the issuance of the certificates, and not in the business of the bank, then the party dealing with him was charged with knowledge of his want of authority, if he had none, and of his failure to deposit the money, as recited, if he so failed. If Holmes issued the certificates sued on, without making a corresponding deposit in the bank, and if the defendants in error knew that he used the certificates, when issued by him, for his own advantage, as distinguished from that of the bank, then they were charged with knowledge of his want of authority to bind the bank by the issuance of the certificates, and could not recover on them.

[2] The record showing without conflict that the defendants in error did know that Holmes, in issuing the certificates, was acting for his own advantage, to pay his individual debt with them, the only question left for decision is whether there was money deposited by Holmes in the bank to cover the issue of the certificates. If none was deposited in fact, the defendants in error were charged with knowledge of that fact, and, from it, with Holmes' want of authority to bind the bank. Ohio Valley Banking & Trust Co. v. Citizens' National Bank, 173 Ky. 640, 191 S. W. 433, 438; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; Hier v. Miller, 68 Kan. 258, 75 Pac. 77, 63 L. R. A. 952; Claflin v. Farmers' & Citizens' Bank, 25 N. Y. 293; Campbell v. Manufacturers' National Bank, 67 N. J. Law, 301, 51 Atl. 497, 91 Am. St. Rep. 438; Amarillo National Bank v. Harrell (Tex. Civ. App.) 159 S. W. 858; Bank v. American D. & T. Co., 143 N. Y. 559, 38 N. E. 713. The case was tried upon this theory, and the only question submitted to the jury was whether or not the money was, in fact, deposited in the bank, as recited in the certificates, and, on this question, the court below placed the burden upon the defendant bank. We think the District Judge misplaced the burden of proof in this respect. The party who deals with an agent, knowing him to be acting in his own interest, takes the risk of his having authority to so act for his principal, and assumes the burden of establishing his authority when he seeks to hold the principal. The case of Hier v. Miller, 68 Kan. 258, 75 Pac. 77, 63 L. R. A. 952, correctly states the rule, as we understand it to be. In that case the court said:

"The rule of law involved, that an agent may not represent himself and his principal in the same transaction, has been applied in many cases. 'Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation in payment of or as security for a personal debt of such officer does so at his own peril. Prima facie the act is unlawful and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation.' Wilson v. M. E. R. Co., 120 N. Y. 145, 150, 24 N. E. 384, 385, 17 Am. St. Rep. 625. 'Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking * * * But certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers, and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he

can recover. There are no presumptions in favor of such a delegation of power.' West St. L. Sav. Bk. v. Shawnee, etc., Bank, 95 U. S. 557, 559, 24 L. Ed. 490. * * * 'But the test of the transaction is whether it is with the bank and its business, or with the cashier personally and in his business. Claflin v. Farmers' Bank, 25 N. Y. 293; Moores v. Citizens' National Bank, 111 U. S. 156 [4 Sup. Ct. 345, 28 L. Ed. 385]. As to the former, all presumptions are in favor of its regularity and binding force. In the latter no such presumption arises. In fact, upon proof that it was known to the claimant to be an individual transaction, and not one for the bank, the burthen is cast upon the claimant to establish by proof that the act of the cashier thus done for his own individual benefit was authorized or ratified. These are fundamental principles applicable to principal and agent in every transaction arising out of that relation.' "

See, also, Harwood v. Ft. Worth National Bank (Tex. Civ. App.) 205 S. W. 484–488.

[3, 4] The question, then, arises whether the record presents any evidence from which the jury might have legitimately inferred that the deposit had been made as recited. If the transaction had not been an individual one of Holmes, the president, the recital in the certificates would have been prima facie evidence of the receipt of the money by the bank. In view of its having been issued by the president in his individual transaction and accepted by the defendants in error with that knowledge, it has no such effect. The letter of Holmes asserting the deposit, written in his own interest to defendants in error, has no greater effect. The only other evidence relied upon is the declaration of McAdams, who was the successor of Holmes as president of the bank, made to William Rust, defendant in error, and while he was president, to the effect that the bank had received the money called for by the certificates. McAdams claims that he made the declaration through mistake, and afterwards corrected it. If McAdams' declaration was an admission of, and as such binding on, the bank, the question of its correctness was for the jury to decide.

We think, however, that the declarations of McAdams, made many months after the transaction between defendants in error and Holmes, of which he had no personal knowledge, were binding upon the bank only as a reply to the demand of the defendant in error William Rust, and not as an admission as to the bank's receipt of the money from Holmes when he signed the certificates of deposit. Even the president of a bank is without authority to bind his principal by statements merely narrative of past transactions. McAdams' denial of receipt of the money and of liability could be proven as the predicate for the instituting of a suit to recover from the bank. If the defendants in error had been prejudiced by his admission of the receipt of the money by the bank, by having acted or delayed action because of it, the bank would be estopped to dispute its correctness. As no injury resulted, the defendants in error could only offer the statements as admissions of the bank, through its president, as to a past transaction. The president was without authority to bind the bank by such statements, as admissions. In the case of Packet Co. v. Clough, 20 Wall. 528, 540 (22 L. Ed. 406), the Supreme Court said of the authority of the declarations of the master, made two days after the occurrence of the transaction to which they related:

"Declarations of an agent are doubtless, in some cases, admissible against his principal, but only so far as he had authority to make them, and authority to make them is not necessarily to be inferred from power given to do certain acts. A captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal, or any servant of his principal, has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. It is not needful the captain should have such power to enable him to conduct the business intrusted to him, to wit, the reception of passengers, and hence his possession of the power to make such admissions affecting his principals is not to be inferred from his employment. It is true that whatever the agent does in the lawful prosecution of the business intrusted to him is the act of the principal, and the rule is well stated by Mr. Justice Story, that 'where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the res gestæ.' A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the 'res gestæ.'"

In the case of Goetz v. Bank of Kansas City, 119 U. S. 551, 560, 7 Sup. Ct. 318, 323 (30 L. Ed. 515) the Supreme Court said of similar declarations of a bank president:

"The testimony of one of the plaintiffs and of one of his attorneys was offered as to declarations of the president of the bank, made several days after the last draft had been discounted, to the effect that the bank had become largely involved in certain wool transactions with Du Bois as early as July or August, 1881, and would have broken off its relations with him if it had not been that this wool matter remained unsettled. The testimony was excluded, and rightly so. The declarations had no bearing upon the good faith of the officers of the bank in the transactions in this case; and, if they had, being made some days after those transactions, they were not admissible as part of the res gestæ any more than if made by a stranger. Evidence of declarations of an agent as to past transactions of his principal are inadmissible, as mere hearsay. Luby v. Hudson River Railroad, 17 N. Y. 131, 133; Adams v. Hannibal & St. Joseph Railroad, 74 Mo. 553 [41 Am. Rep. 333]."

The declarations of McAdams were incompetent, within the rule laid down in the cases quoted from. His statement that the books of the bank showed that the certificates sued on were issued was an admission that past transactions had occurred, and had been evidenced by entries on the bank's books. Little efficacy would be left to the rule against a principal being bound by statements of its agents as to past transactions, if such statements could be made binding on the principal by being so made as to disclose that they were based on the agent's inspection of books not shown to have been lost or destroyed. A result would be that an agent of a principal whose transactions are evidenced by books could bind the principal by admissions as to past transactions by merely putting his admissions in the form of statements of the contents of his principal's books. The books of account of the bank were introduced in evidence in the District Court. The record fails to disclose that the books were in-

complete. The register of certificates of deposit did not show the issue of the certificates sued upon. It would seem that the bank's book of account should show conclusively, by the balances, whether the bank ever received the money, which should have been deposited, when the certificates were issued.

Counsel for the plaintiff in error asserted in argument that they do show the money was not received. Counsel for defendants in error stated that they were unable to determine what the books showed as to the receipt of the money. We conclude that there was no legal evidence offered by the defendants in error to support the burden resting upon them to show the deposit of the money called for by the certificates, and this results in the reversal of the judgment, and the remanding of the case for further proceedings conformable to this opinion; and it is so ordered, the costs to be taxed against the defendants in error.

BATTS, Circuit Judge (dissenting). Anna and William Rust sued First National Bank of Sweetwater, Tex., on three certificates of deposit of $2,000 each, issued in the name of the bank by its president, J. V. W. Holmes, July 5, 1915, to mature 11 months after date, with 6 per cent. interest. Interest was paid June 5, 1916, and the certificates extended, by verbal agreement, for one year. Upon the presentation of the certificates for payment, the bank denied liability. Holmes owed plaintiff certain land notes. He wanted to dispose of the land by which the notes were secured, and Rust, to accommodate him, accepted as part payment of the notes, which were not then due, certificates of deposit, payable at the date of the maturity of the notes. The transaction was by correspondence, and a letter from Holmes stated that the deposit for which the certificates were issued had been made.

The bank denies liability upon the certificates, upon the ground that the debt which was discharged was the individual debt of Holmes. The legal proposition is made that a note or other obligation of a bank, given in discharge of a personal debt of the official, in the absence of express authority from the directors, is void. The general principle is well enough established and upon entirely satisfactory grounds. When the creditor of a bank official receives the obligation of the bank in discharge of such debt, he has notice that the credit of the bank is being used for an illegal and an improper purpose. He will know that the officer is acting outside of his general authority. The creditor cannot safely accept the obligation without knowledge of the actual authority of the officer. Even if he should ascertain that the directors have undertaken to authorize the giving of the bank's notes for an individual debt, a question would arise as to whether such authority could be conferred.

The present case presents a situation somewhat different. The certificates of deposit in suit are not negotiable instruments. The liability which such a certificate imports is not created by the instrument itself, but exists as the result or effect of facts which the certificate evidences. The certificate is a receipt for money, but is not conclusive evidence that the deposit has been made. There may

be a denial of the fact of the deposit and evidence to support the denial. If the deposit has not in fact been made, the bank is not liable, notwithstanding a certificate has been issued. The certificate is evidence, but not conclusive evidence, of facts which place liability upon the bank. The certificate does not itself create a liability. The execution of a promissory note may result in a liability, without reference to whether it is based upon a consideration. A certificate of deposit creates nothing, but merely establishes, or prima facie establishes, a fact which may be the basis of a liability.

The question in this case is whether or not a deposit was made for the plaintiff. If it was the bank is liable. If it was not, the bank (under the issues made) is not liable. Holmes, at the time he issued the certificates of deposit, was the president of the bank. In the course of business of the bank, he had a right to speak for it. He had authority to accept deposits and issue certificates of deposit. He exercised this authority. He made a statement in writing to the effect that the deposit had been made. He was authorized to make such statement for the bank. If it was not true, the bank (no issue of estoppel being presented) would not be liable, notwithstanding his statement.

A certificate of deposit, issued in the course of business by a person who was the chief officer of the bank, and who had specific authority to receive money for the bank and issue statements that it had been received, ought to carry the prima facie presumption that the deposit which it recites had been made. The tender to plaintiff of the bank's note would have given notice that Holmes was undertaking to do that which was beyond his authority as bank president. His statement that money had been deposited to the credit of plaintiff was a statement made in the course of business that he had done something which he had a right to do, and the doing of which would place liability on the bank.

Nor would the transaction necessarily be one for his own benefit. By securing deposits and issuing certificates, he was carrying out the policy of the bank. Plaintiff had been given the option of being paid in cash or having the money deposited in the bank. It would have been advantageous to the bank that the deposit be made. She had made deposits before and received certificates from Holmes, and she accepted these certificates without knowledge of anything wrong, and without reason to make any character of inquiry, and without any knowledge, or notice, or intimation that she was doing anything that would be advantageous to Holmes, or other than advantageous to the bank. The bank held out the president as a person worthy of confidence. Plaintiff cannot be charged with any character of fault in assuming that the deposit which he said was made, was in fact made. The president had a right to make such a deposit. He had general authority to issue certificates of deposit. Plaintiff had a right to assume that he had properly exercised his authority.

The certificate on its face was regular. It was issued in the name of the bank, by the president of the bank, who had authority to issue. It imported a consideration, and prima facie evidenced a debt

of the bank. The burden was properly placed on defendant to prove its invalidity.

At the time payment of the certificates of deposit was requested, Holmes was no longer connected with the bank, having prior thereto become a defaulter. Ascertaining that fact, Mr. Rust asked Mr. McAdams, then president, whether the bank books showed the deposit. The latter went into the vault, examined the books, returned, and stated that the books showed the deposit. There is no controversy about this. Mr. Rust testifies that McAdams also stated that the books showed three certificates, of $2,000 each, and promised that they would be paid at maturity on June 5th. McAdams denied these statements, and further testified that he subsequently ascertained that he was mistaken as to the records showing deposits of $6,000 by Mrs. Rust, explaining that he had been misled by entries on the deposit register offered in evidence, which showed four certificates issued to Mrs. Rust, aggregating $1,000, and one immediately under these for $5,000, without either ditto marks or name. He testified that this $5,000 certificate was in fact issued to the Kansas City Life Insurance Company.

The verdict of the jury involved a finding that the deposit had been made. If there was any evidence to that effect, the verdict should be sustained. It is insisted that the statement of McAdams was made by an agent of the bank, long after the transaction, and that the corporation would not, on that account, be bound. The transaction between plaintiff and Holmes was not the subject-matter of the statement by McAdams. His statement had exclusive reference to what was shown by the records of the bank as to the business of the bank. If the bank's books showed that the deposit was made, that fact could be established to show the fact of the deposit. McAdams was president of the bank, in actual control of its affairs. He was in charge of and helped to make its records. In the course of the business of the bank, in response to the question of a customer of the bank with regard to pending bank business, he made a statement of what was shown by the books of the bank. It was not a recital of a past transaction, but a statement of an existing status. It was his duty, under the circumstances, to make the examination and state the facts disclosed. It may be that that which he said was not conclusive, either as to what the books showed, or as to the fact which the books evidenced. It may be that the bank is not estopped from showing that the president was mistaken as to what the bank books showed. It may be that the admissions are not conclusively binding.

Certain bank books were introduced which contained nothing to sustain the statement which Rust says the president made to him. It is entirely possible that the president did, in the first instance, make a mistake. It is entirely possible that the part of the record which he pointed out was that which misled him. It is also possible that there were other records, which he examined at the time, which sustained the statement that Rust said he made at the time. If the books showed what Rust says McAdams told him, they evidenced the deposit which is the basis of the suit. The admission as to the contents

of the books was made in the course of the business of the bank, by the person properly conducting that business, and within the line and scope of his duties as an officer. The matter was before the jury; they were entirely within their province in determining whether they would accept the admission which they had a right to find he had made when first asked about the liability of the bank, or accept the statement which he subsequently made, supported by such bank books as were produced.

It may be that no deposit was ever made in the bank for the benefit of the plaintiff; but a jury was justified in concluding that the books showed the deposit, and that such a deposit had been made. Two presidents of the bank made statements to that effect. In the selection of high officers of the bank, the directors make a peculiar appeal to the public to rely upon their integrity. The relations which result are of the most confidential character. The entire business of the country is based upon the belief of the general public that confident reliance may be placed in the honesty of such officials. If the bank is to be sustained on this appeal, one of its customers is to be deprived of more than $6,000, because she was willing to rely upon the honesty of a bank president, held out by the bank to be worthy of confidence, and accepted the word of his successor, held out by the bank as worthy of confidence.

The jury were authorized to find that the persons selected by the First National Bank of Sweetwater, Tex., to represent it in its financial affairs, did not defraud the plaintiff, but that the deposits for which she holds the bank's certificates were in fact made.

The judgment ought to be affirmed.

(257 Fed. 37)

RINEHART & DENNIS CO. v. CHILDRESS & TAYLOR.

(Circuit Court of Appeals, Fourth Circuit. February 13, 1919.)

No. 1675.

1. EVIDENCE ⟹96(2)—ACTION ON CONTRACT.
   A railroad contractor, sued by subcontractors, *held* to have the burden of proving as an affirmative defense that damage for which it paid a judgment to a landowner was caused by unskillfulness or negligence of plaintiffs, for which they contracted to be responsible.

2. EVIDENCE ⟹332(1)—RECORD IN ANOTHER SUIT.
   The record on appeal in an action in a state court, including evidence, *held* not admissible in an action in a federal court between two of the defendants, in which the issues were not the same.

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry C. McDowell, Judge.

Action by Childress & Taylor against the Rinehart & Dennis Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

G. M. McNutt, of Charlottesville, Va. (A. P. Walker, of Charlottesville, Va., on the brief), for plaintiff in error.

S. H. Sutherland, of Clintwood, Va. (Geo. C. Sutherland, of Clintwood, Va., on the brief), for defendants in error.

Before PRITCHARD and WOODS, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge. The transcript discloses the following case:

The Carolina, Clinchfield & Ohio Railway Company entered into a contract with Rinehart & Dennis Company for the construction of a line of railway between Elkhorn City, Ky., and Dante, Va. Rinehart & Dennis Company, hereafter referred to as plaintiff in error, sublet a portion of the work to Childress & Taylor, hereinafter referred to as defendants in error. It was provided in the contract between these parties that the work was to be done by the subcontractors in all respects in accordance with the plans, specifications, directions, and orders of the chief engineer of the railway company.

The subcontractors assumed all liability and agreed to indemnify the contracting company against all loss or damage "sustained by depositing material to public injury or to the injury of any person or corporation, including cost and expense of defense, provided they be notified of the bringing suit and be permitted to defend." They also assumed responsibility for all damage done by their workmen, during the performance of the work, to property adjacent to said line of railway, in consequence of their unskillfulness or negligence. If any such damage was done, the chief engineer should have the right to settle and pay the same, and to deduct the amount thereof from the payments to be made under the contract. Payments were to be made on account of the work and material upon the estimates certified by the chief engineer, and when he certified that the work was completed and accepted, final payment was to be made—such certificate to be conclusive, the subcontractors executing a release from all claims and demands whatsoever growing in any manner out of the agreement.

On July 31, 1914, the defendants in error received from the engineer the "final estimate" of the work done and material furnished under the contract, showing a balance due them thereon of $8,328.29. On the 28th of May, 1917, defendants in error brought an action in assumpsit against plaintiff in error for the recovery (among other items) of this balance, filing with their declaration a statement of account or bill of particulars of which said amount constituted the first item.

[1] Plaintiff in error pleaded nonassumpsit and filed their "grounds of defense," in which the balance on "final estimate" was included among other items. Among other grounds of defense it set forth that, between February 1, 1915, and October 1, 1916, it paid, in discharge of a judgment, interest, and cost recovered in the state court, by one Hill against the railway company, plaintiffs in error, and defendants in error, jointly, the sum of $2,816.72, which it claimed as a

credit or set-off on account of the balance due plaintiffs on the "final estimate." Upon the trial, for the purpose of establishing this "ground of defense" credit, or offset, plaintiff in error offered in evidence "the pleadings and orders in the Elkanah Hill litigation in the circuit court of Dickerson county, Virginia." Upon objection of defendant in error, the District Judge stated that, in his opinion:

"The defense made in regard to this judgment was an affirmative defense, and therefore the burden was on plaintiff in error. It follows it cannot put in evidence in that trial the pleadings and evidence in the Hill case, unless it avowed that it would introduce evidence tending to show either: (1) That the liability to Hill arose solely from the negligence or other wrongdoing of Childress and Taylor; or (2) evidence that will clearly and satisfactorily show that an ascertainable, definite part of the entire amount was due to the sole wrongdoings of Childress and Taylor."

Counsel, when asked whether they could make the avowal, responded that they could not do so. The court excluded the proposed evidence, and plaintiff in error excepted. It then offered to introduce a transcript of the record in the same case, the original writ of supersedeas from the Supreme Court of Appeals of Virginia, and the final order certified by the clerk of said court. This transcript included the evidence in said case sent up on appeal to the Supreme Court of Appeals of Virginia. This was also, upon objection, excluded, and plaintiff in error excepted.

No other evidence having been offered to sustain its contention in respect to the payment of the judgment in the Hill case, the court directed the jury to return a verdict for defendant in error in respect to that item. Plaintiff in error excepted, and assigns each of the said rulings of the court as error.

Passing the objection to the admissibility of the evidence, raised by defendant in error because the claim to deduct the amount of the Hill judgment from the amount found by the engineer to be due them, for that it was not pleaded as a set-off or payment, and not admissible under the plea of non assumpsit, and treating, as the District Judge did, the evidence as relevant to the issue, we proceed to inquire respecting the validity of defendant's exception.

The record in the case of Elkanah Hill v. Railway Co., the plaintiff in error, and defendants in error, jointly, discloses a declaration containing five counts, all of which aver that plaintiff was the owner, to the middle of the stream, of a tract of land lying on the waters of Russell Fork creek, upon which he had constructed and operated a mill; also that, upon said creek were rich, productive bottom lands used and cultivated by plaintiff.

The first count charges that defendants wrongfully trespassed upon said lands, and by the several means, elaborately set out, destroyed his milldam and injured the bottom lands. The second count charges that defendants wrongfully and unjustly erected and built a certain wall, bank, or mound in, along, and near the said creek, on the opposite bank to plaintiff's land, in a careless, negligent, and improper manner; that by reason thereof the plaintiff's land was overflowed, and covered with sand, stones, and gravel, to the injury of his mill and bottom

lands. The third count charges that the embankment was constructed to an unreasonable height, and extended so near to, and out so far in, the edge of the creek as to divert the water over plaintiff's land and wash away his bottom lands, banks, mill, etc. The fourth count charges that the embankment was built in a negligent, careless, and improper manner. The fifth count charges the negligent and careless construction of the embankment on the side of the creek opposite plaintiff's land and mill. All of said acts are alleged to have damaged plaintiff's land and mill.

The defendants jointly pleaded "not guilty," and the parties went to trial on the general issue. The jury returned a general verdict for plaintiff, and assessed his damages at $2,000. Judgment was rendered on the verdict against defendants jointly, and, upon appeal to the Supreme Court of Appeals of Virginia, this judgment was affirmed. Carolina, C. & O. R. Co. v. Hill, 119 Va. 419, 89 S. E. 902.

It would seem that plaintiff's cause of action, as set out in one or more counts of his declaration, was for the improper and wrongful location by the engineers of the roadbed and embankment along the banks of the creek, whereby he sustained the injuries of which he complains, while other counts are capable of the construction of an allegation of a negligent manner of performance of the work. For either wrongful act or trespass the defendants in that action were jointly liable to plaintiff. The liability of Childress & Taylor to Rinehart & Dennis Company for indemnity or exoneration for the amount paid by it in satisfaction of the judgment is dependent upon other principles of law. Defendants in error, Childress & Taylor, having introduced in evidence the "final estimate" of the engineer and the contract under which the work was performed, were entitled to recover the amount certified to be due, unless the Rinehart & Dennis Company by competent testimony, established either payment or a set-off to the full or partial amount of the claim. We concur with the District Judge that this was an affirmative defense, the burden of which was upon Rinehart & Dennis Company.

The law being settled that, save in exceptional cases, no action will lie between joint tort-feasors for contribution or exoneration, it became the duty of the Rinehart & Dennis Company to show that their claim for exoneration came within the exceptions to the general rule. This they could do, in the light of the contract, by showing either that, in the action brought by Hill against them jointly, the recovery was based upon some negligent act for which Childress & Taylor were alone liable, as for negligent performance of the work, or that the recovery was based upon some act of Childress & Taylor within the provisions of the contract against which they contracted to indemnify Rinehart & Dennis Company. The declaration alleged that the damage was sustained by reason of the joint negligence of the parties, in one of several ways—a joint trespass; a wrongful erection of the embankment; an unreasonable location and height of the embankment; a careless and negligent manner of doing the work. For injury sustained by Hill for one or more of the alleged wrongful acts, such as the location of the embankment, or its height, as fixed by the plans and specifica-

tions of the engineer, Childress & Taylor were not responsible to Rinehart & Dennis Company; but if the injury was inflicted upon Hill by the negligent manner of doing the work, they were responsible. Again, if the damage was sustained "by depositing materials, it came within the terms of the provision for indemnity."

In the absence of any specific or special pleas filed by the plaintiff in error in this action, by which the court and the defendants in error were informed as to its contention, it was proper and in accordance with the well-settled practice for the court to call upon counsel to state or avow in what manner they proposed to make the transcript relevant to the issue. In the absence of such evidence, the transcript was irrelevant and incompetent. As stated by the learned District Judge, its relevancy, and therefore its admissibility, was dependent upon plaintiff in error showing by evidence aliunde the transcript that the liability to Hill arose solely from the negligence or other wrongdoing of Childress & Taylor, or that an ascertainable definite part of the damages recovered was due to such negligence. The court may have admitted the transcript, and, upon failure of plaintiff in error to follow it up with such evidence, have stricken it from the record, or directed a verdict upon the record. The method or order of presenting the question was within the sound discretion of the District Judge.

Plaintiff in error is entitled to have its exception to the direction of a verdict on this claim considered as if it had introduced the transcript and rested. What occurred is equivalent to the declaration, by counsel, that this was what they proposed to do. By frankly saying to the court that they could not avow that they would introduce evidence tending to show a condition which would make the transcript relevant and a link in a chain of evidence tending to establish their right to have the amount paid in discharge of the judgment, deducted from the balance due defendant in error, they conceded that, with the transcript in evidence, such would be their attitude before the court. From this viewpoint, we concur with the District Judge that they had failed to carry the burden of proof which the law imposed upon them.

[2] For the reasons stated by the District Judge, we concur with him that the record, sent to the Court of Appeals of Virginia, containing the evidence, or only so much thereof, as was deemed necessary to present appellant's exceptions, was not competent. The issue being tried in that case was not the same as in this. The exceptions to the charge of the court in regard to the other items in the declaration were not pressed. The contention in regard to them was fairly submitted to the jury.

The judgment of the District Court will be affirmed.

(257 Fed. 42)

NEW YORK, P. & N. R. CO. v. WILKINS et al. THE N. Y., P. & N. BARGE NO. 4. THE DELMAR.

(Circuit Court of Appeals, Fourth Circuit. January 20, 1919.)

No. 1641.

COLLISION ⟹104—FAULT—BURDEN OF PROOF—VIOLATION OF HARBOR RULES.

A tug leaving the port of Norfolk, with a tow exceeding by 300 feet the length prescribed by the harbor regulations, *held* to have the burden of showing that such violation did not cause or contribute to a collision in Elizabeth river between the tow and another vessel.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in admiralty by Lillie Wilkins, administratrix of the estate of Alexander Wilkins, deceased, and others, against the tug Delmar and the N. Y., P. & N. Barge No. 4; the New York, Philadelphia & Norfolk Railroad Company, claimant. Decree for libelants, and claimant appeals. Affirmed.

For opinion below, see 248 Fed. 823.

Floyd Hughes, of Norfolk, Va. (Thomas H. Willcox and Hughes & Vandeventer, all of Norfolk, Va., on the brief), for appellant.

John W. Oast, Jr., and R. T. Thorp, both of Norfolk, Va., for appellees.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

PRITCHARD, Circuit Judge. This libel was filed to recover for loss of life of Alexander Wilkins, on the 29th day of October, 1916, about 6 o'clock p. m., caused by a collision at a point northerly of and in the vicinity of the can buoy at the entrance to the West Norfolk channel from the main channel of the Elizabeth river, Norfolk, Va., between an unnamed gasoline launch, in which the deceased, Edward Bishop, Elizabeth H. Simmons, and Lubertia Howell were at the time, and barge No. 4, with 28 loaded railroad freight cars on board, in tow of the tug Delmar, whereby the launch was capsized and lost, and the four persons on board drowned, and is an appeal to this court from the District Court of the United States for the Eastern District of Virginia, at Norfolk. Administrators for the three persons named, other than the libelant, filed their petitions in said libel case under the rule.

The gasoline launch was about 30 feet long, 6 feet broad, 3½ feet deep, with a wooden house or cabin extending from a point about 6 feet abaft the stem and extending aft to a point about 6 feet from the stern, and at the time of the accident was in charge of Wilkins, her owner and master, and Bishop was acting as engineer. Barge No. 4, designed for the transportation of railroad freight cars between Norfolk and Cape Charles, is 340 feet long, 50 feet broad, and 1,174 tons net register, and was being towed on a hawser of some 80 or

90 fathoms long, by the steam tug Delmar, 112.3 feet long, 26.9 feet broad, and 11.7 feet deep, and 130 tons net register, 240 tons gross.

The libelant alleges that on the date named the launch was proceeding at about 6 miles an hour, up the Elizabeth river to the westward of the channel, bound for Norfolk, the course of the launch being in a general southeasterly direction, parallel to the main channel extending between Lambert's Point and Pinner's Point; and the Delmar, with the barge in tow, was proceeding from the N. Y., P. & N. terminal at Port Norfolk, bound for Cape Charles. As the tug proceeded out of the West Norfolk channel, and began to shape her course for the northward, the launch stopped her engines, and waited for the barge to follow the tug; but, instead of doing so, it made a shorter turn than the tug, and took a course to the westward of the can buoy at the entrance of the West Norfolk channel, heading in the direction of said launch, which was drifting under the influence of a strong flood tide. The launch immediately proceeded to back to avoid the barge; but the latter swung in towards the launch faster than the launch could get away, so that the cable from the barge to the tug caught the bow of the launch, tipping it over on its port side, where it lay until the forward part of the barge struck it, and carried it under water, drowning all on board, and the launch was a total loss. At the time of the collision the weather was cloudy and calm, and the tide flood.

The libelant charges the following faults against the Delmar: That she was navigating in the harbor with a tow which, including the length of the Delmar, exceeded the length of 700 feet, contrary to the harbor regulations, the hawser being 540 feet long; that she was not manned by a competent master and crew; that she was navigated without a competent lookout properly stationed and attending to his duties; that she was proceeding at an illegal rate of speed, and on the west side of the channel, and that she did not observe the launch lying to the westward of the channel, and the course of her tow, in time to take precautions against running down the launch; and further charges as faults against the barge that it was not managed by a competent master and crew; that it did not have a competent lookout, properly stationed and attending to his duties; in that it was part of a tow which including the length of the Delmar, exceeded 700 feet, and navigated in the harbor of Norfolk; that it did not follow the course of the Delmar, but steered to the port and to the westward of the can buoy at the entrance of the West Norfolk channel, and thereby without warning ran down the launch, which was waiting for it to pass on the course of the tugboat; and that, when the collision became imminent, the towing hawser was not turned loose from the barge, as it easily could have been.

The respondent admits collision with a gasoline launch at about the time stated in the libel, but contends that it occurred in the main channel of the Elizabeth river, nearly opposite black spar buoy No. 11 and denies generally the facts relating to the collision as alleged in the libel, and particularly charges that the launch, before and when it passed the Delmar, was proceeding up the river on the extreme eastern

edge of the channel, the Delmar at the time proceeding out of the West Norfolk channel, and shaping her course to the northward, so as to keep to the starboard side of the main ship channel, after passing Lambert's Point piers. It also denies that the barge did not follow the tug, or that it headed in the direction of the launch, or that the launch was drifting under the influence of a strong flood tide, and alleges that the tug, proceeding down the channel on her usual and proper course, with the barge following in her wake, passed the launch starboard to starboard, when about opposite the merchandise piers at Lambert's Point, the launch at that time being several hundred feet to the eastward of the tug, and well over on the eastern side of the main ship channel, the launch and tug having interchanged "salute" whistles, when about abreast of each other. Shortly afterwards the tug heard distress signals from the barge, and then observed that the launch had suddenly and unexpectedly and without warning changed her course in the wake of the tug; that the bow of the launch struck the forward end of the barge and immediately sank; that nothing could have been done, either on the part of the tug or the barge to avoid the collision, and no other maneuver was possible, save to stop the tug's engine, which was done.

Respondent also charges that the launch was at no time on the port side of the tug or barge, but, on the contrary, that she was far to starboard; that the launch was navigated by unskillful, unlicensed, and negligent navigators; that she was not in charge of an experienced and careful master; that she had no efficient lookout properly stationed; and, further, that the decedent, Wilkins, being master of and in charge of the launch's navigation, was guilty of negligence contributing to the collision, which is a bar to a recovery by his administratrix herein.

The court below entered a decree awarding $7,500 damages for the loss of the life, of Wilkins, $600 for the loss of the launch, $4,500 for the loss of the life of Edward Bishop, and $1,500 each for the loss of the lives of Elizabeth H. Simmons and Lubertia Howell. The court below, among other things, found as a fact that—

"The tow, as well as the hawser in use at the time of the collision, were both greater in length than prescribed by the state and federal statutes. The tug was 129 feet long, the hawser 90 fathoms, or 540 feet, and the barge 340 feet, making more than 1,000 feet for the entire tow, which exceeded the local regulations by 300 feet, and the hawser 15 fathoms, or 90 feet, longer than allowed by the federal statutes."

It appears that the waters between the port of Norfolk and the terminal at Cape Charles consist of narrow channels and anchorages, more or less dangerous at all times, and extremely so when a tug with a tow leaves either one or the other of the terminals mentioned with a 540-foot tow line, and required to traverse a circuitous course.

Counsel for the appellant insist that this rule only applies to seagoing barges—

"and the department that promulgated these regulations ruled on January 25, 1909, six days prior to the regulations taking effect, that these barges were not seagoing barges subject to such regulation, a fact which has been before the court in all the cases in which these car floats have been involved."

Regulations promulgated pursuant to Act Cong. May 28, 1908, c. 212, 35 Stat. 428, require hawsers or tows of seagoing barges navigating the inland waters of the United States to be limited in length to 75 fathoms, and should in all cases be as much shorter as the weather or sea will permit. Section 18 of the harbor regulations also provides that "no tows exceeding 700 feet in length shall enter or depart from the harbor." It is probable that these regulations were adopted in view of the fact that only seagoing barges under the act of Congress were affected thereby. The act of Congress, standing alone, could not be invoked in a case like the one at bar. Hence we have the harbor regulations which apply to tows, either seagoing or otherwise, and prohibit any tow exceeding 700 feet in length to enter or depart from the harbor.

Indeed, the contention of counsel for appellant is based upon the theory that vessels passing through these dangerous channels may do so at will with any length of hawser, without considering any risk that may be incurred thereby. The master of the Delmar, who was a witness in the court below, clearly indicated as much by the following question and answer:

"Q. Don't you pay any attention to the regulations of the barbor master, which provide you shall not proceed south of Sewall's Point, with a tow exceeding 700 feet in length? A. We always go out longer than that I suppose."

This condition, if conceded, does not relieve the tows entering the harbor from the duty of conforming to the rules, and the court below having found as a fact that the tow exceeded the length prescribed by the port rules casts upon the tow the burden of showing that such violation did not contribute to the injury, and this has not been done in this instance. In the case of The Pennsylvania, 19 Wall. 125–136 (22 L. Ed. 148), the court, in referring to this point, said:

"But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute. In the case of The Fenham, 23 Law Times, 329, the Lords of the Privy Council said: 'It is of the greatest possible importance, having regard to the admiralty regulations, and to the necessity of enforcing obedience to them, to lay down this rule: that if it is proved that any vessel has not shown lights, the burden lies on her to show that her noncompliance with the regulations was not the cause of the collision.'"

Also in the case of Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291–298, 37 Sup. Ct. 270, 61 L. E. 726, the Supreme Court quotes with approval the foregoing.

There are a number of other decisions of the Supreme Court to the same effect, notably Belden v. Chase, 150 U. S. 674, 698, 14 Sup. Ct. 264, 37 L. Ed. 1218, and Richelieu & Navigation Co. v. Boston Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398.

Having carefully considered the other assignments of error, we are of opinion that they are without merit.

For the reasons stated herein, the decree of the lower court is affirmed.

(257 Fed. 46)

BROWN v. UNITED STATES.*

(Circuit Court of Appeals, Fifth Circuit. February 12, 1919.)

No. 3232.

1. CRIMINAL LAW ⚷242(1)—FEDERAL COURTS—TRIAL OF CAPITAL CASES IN COUNTY OF OFFENSE.

Judicial Code, § 40 (Comp. St. § 1022), providing that capital cases shall be tried in the county where the offense was committed, where that can be done without great inconvenience, does not contemplate a transfer of the cause to another court, but a trial by the same court in the county where the offense was committed, and the court where the indictment was found does not lose jurisdiction by ordering such a transfer for trial.

2. CRIMINAL LAW ⚷113—CAPITAL CASES IN FEDERAL COURTS—WHERE TRIABLE.

Judicial Code, § 40 (Comp. St. § 1022), providing that capital cases shall be tried in the county where the offense was committed, "where that can be done without great inconvenience," does not give a defendant an absolute right to trial in such county, but the matter rests in the discretion of the court.

3. INDICTMENT AND INFORMATION ⚷86(2)—OFFENSES WITHIN FEDERAL JURISDICTION.

An indictment charging commission of an offense on a parcel of land described by metes and bounds, alleged to have been acquired with the consent of the state for "public purposes" by the United States and to be under its exclusive jurisdiction, *held* sufficiently specific under Criminal Code, § 272 (Comp. St. § 10445), to give jurisdiction to a federal court.

4. CRIMINAL LAW ⚷304(14)—JUDICIAL NOTICE—OFFENSES WITHIN FEDERAL JURISDICTION—PLACE OF OFFENSE.

Where an indictment in a federal court sufficiently described the place where the offense was committed, the court will take judicial notice of facts which vest the United States with exclusive jurisdiction over such place.

5. CONSTITUTIONAL LAW ⚷62—DELEGATION OF LEGISLATIVE POWER.

Rev. Civ. St. Tex. 1911, art. 5275, authorizing the Governor, on application therefor, to cede exclusive jurisdiction to the United States over lands described in the application and acquired by the United States for certain specified purposes, operates as a blanket consent by the Legislature to such cession, leaving to the Governor only the power to determine when the specified conditions exist, and is not a delegation to him of legislative power.

6. CRIMINAL LAW ⚷1169(1)—HARMLESS ERROR—OFFENSES WITHIN FEDERAL JURISDICTION—EVIDENCE.

In a prosecution for murder committed on land alleged to be within the exclusive jurisdiction of the United States, where the land is described and shown by oral testimony to have been in the exclusive possession of the United States at the time, it was not necessary to prove its title, and introduction of title documents and deeds, could not have injured defendant, whether technically proven or not.

7. HOMICIDE ⚷118(1)—SELF-DEFENSE—DUTY TO RETREAT.

One attacked by another with a knife, not in his own house or on his own premises, is justified in fatally shooting his assailant only where apparently he cannot avoid his own injury by retreating.

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari granted 250 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

In Error to the District Court of the United States for the Southern District of Texas; William B. Sheppard, Judge.

Robert B. Brown was convicted of murder, and brings error. Affirmed.

James R. Dougherty, of Beeville, Tex. (G. R. Scott and Boone & Pope, all of Corpus Christi, Tex., and Dougherty & Dougherty, H. S. Bonham, and James F. Odem, all of Beeville, Tex., on the brief), for plaintiff in error.

John E. Green, Jr., U. S. Atty., of Houston, Tex. (John R. Beasley, of Beeville, Tex., on the brief), for the United States.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The plaintiff in error was tried and convicted of the murder of one James P. Hermes and sentenced to a term of 15 years in the Atlanta penitentiary for the crime of murder in the second degree. From the judgment of conviction the defendant sued out this writ of error.

The plaintiff in error has assigned 54 errors on the record. Instead of taking up the assignments seriatim, it will serve the ends of brevity and clearness to group them according to the various questions they present.

[1] The first group insisted on in argument relates to the preliminary questions as to whether the defendant was properly tried in Nueces county, Tex., instead of in Bee county, the county in which the offense was committed, and as to whether the court below, at the time of the trial, still retained jurisdiction of the cause.

Section 40 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1100 [Comp. St. § 1022]) provides that—

> "The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience."

Under this section the defendant applied to the District Judge for a trial in Bee county, and the court granted the application, and ordered the case set down for trial at Beeville, the county seat of Bee county, at a special term. The special term was not held. Before the case was again set for trial, the District Judge died. The case thereafter came up for hearing at Corpus Christi before Hon. W. B. Sheppard, who had been designated to sit in the Southern district of Texas. The court, on motion of the district attorney, dismissed the pending indictment, under which the order for a trial at Beeville had been made, and the grand jury then returned a new indictment, identical in substance with the old one. The defendant objected to the dismissal of the first indictment. The propriety of the dismissal, however, is not open to question. 12 Cyc. 374. Nor could any injury have resulted to the defendant from being tried under the new indictment, unless for the reason that the court had lost jurisdiction of the offense, as contended by defendant, before the grand jury returned the second indict-

ment, by reason of the order of the District Court changing the place of trial from Corpus Christi to Beeville.

The transfer of a cause from one court to another, properly effected, would undoubtedly divest the original court of further jurisdiction, as was the case in Smith v. Commonwealth (Ky.) 25 S. W. 107, relied upon by the plaintiff in error. In the instant case, there was no transfer from the original court to another. The prosecution was instituted in the District Court of the United States for the Southern District of Texas, Corpus Christi Division, and remained in that court until conviction and sentence. Section 40 does not contemplate a transfer of the cause to another court, but only a trial by the same court in the county where the offense was committed. The District Court in which the first indictment was returned did not part with jurisdiction over it by ordering a trial at Beeville, and, even if the subsequent trial had been had under the first indictment, the District Court sitting at Corpus Christi would have had jurisdiction to there try it. The dismissal of the first indictment and the return of the second was authorized, but, in any event, the defendant suffered no prejudice from being tried under the second indictment, instead of the first.

[2] After the return of the second indictment, the defendant reinterposed his request for a trial in Bee county, which, after a hearing, was denied. Section 40 of the Judicial Code does not confer upon a defendant an absolute right to a trial in the county where the offense was committed, but only a qualified right in cases where such a trial could be had "without great inconvenience." The District Court is vested with discretion in making this determination. The trial judge, after a hearing, determined that a trial could not be had at Beeville without great inconvenience, for reasons recited in the order, and which do not show any abuse of discretion, if, indeed, they are not sufficient. Nothing less than an abuse of discretion would justify an interference by this court on appeal.

[3] The second question, insisted upon by the plaintiff in error, relates to the sufficiency of the indictment on which the defendant was tried, and under which he was convicted. It is questioned for failing to sufficiently describe the locality where the alleged murder was committed to give a federal court jurisdiction. Jurisdiction in the federal court was claimed by the government under the following part of the third subdivision of section 272, chapter 11 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1142 [Comp. St. § 10445]):

> "Or any place purchased or otherwise acquired by the United States by consent of the Legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

The indictment alleged that the United States acquired in Beeville, Bee county, Tex., a parcel of land for the public purpose of the United States, described by metes and bounds; that, prior to the date of the commission of the offense, constitutional and exclusive jurisdiction over the site of said parcel of land was ceded to the United States by the state of Texas in the manner provided by law; and that, from the date of the cession until the time of the finding of the indictment, the said parcel of land was under the exclusive jurisdiction of the

United States, and was so on May 7, 1917, when the offense was there committed.

The indictment is criticized because it fails to allege the character of public use for which the parcel of land was acquired and used by the government. It may be conceded that the third subdivision of section 272 of the Penal Code confers no right on the United States to accept a cession of jurisdiction from a state for other than the purposes set out in section 272. For the purposes of this case, the use must have been for a "needful building." Exclusive jurisdiction of a tract used for a purpose other than one of the named statutory purposes would be unauthorized. The site was, in fact, acquired for a post office, but the indictment avers only that it was acquired for public purposes. It is contended that this is a fatal defect, because the locality of the offense was jurisdictional, and the indictment must show jurisdiction on its face. The indictment does identify the tract on which the crime is alleged to have been committed by describing it by metes and bounds, and also by alleging the date of the cession of jurisdiction by the state of Texas to the United States. The defendant was fully informed as to the locus of the alleged offense and the claim of exclusive federal jurisdiction arising from it, and it is difficult to see how he could have been prejudiced by the imperfect averment, if there was one, and why it should not, therefore, within the terms of section 1025, R. S. (Comp. St. § 1691), be deemed sufficient.

[4] Again, the place being sufficiently described, if the court judicially notices its character, then neither averment nor proof of it would be essential. In the case of Jones v. United States, 137 U. S. 202, on page 212, 11 Sup. Ct. 80, on page 83 (34 L. Ed. 691), the Supreme Court said:

> "Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

And again, on page 214 of 137 U. S., on page 84 of 11 Sup. Ct. (34 L. Ed. 691), the court said:

> "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the Legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

In that case it was held that an executive proclamation that the island of Navassa, on which a murder was charged to have been committed, appertained to the United States by determination of the President, was basis for the court's taking judicial notice that it was a place under the sole and exclusive jurisdiction of the United States. In this case exclusive federal jurisdiction depended upon a written application by the United States to the Governor of Texas for a cession of jurisdiction, the cession by the Governor of such jurisdiction and its acceptance by the United States. In line with the case cited, we hold that

the federal courts take judicial knowledge of the documents mentioned and of the character of the place described in the indictment, as to jurisdiction resulting from them. In the case of Holt v. United States, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138, the Supreme Court said of an indictment, which alleged that an offense was committed "within the Ft. Worden military reservation, a place under the exclusive jurisdiction of the United States":

> "The indictment is well enough. The words quoted at the outset convey with clearness sufficient for justice that the Ft. Worden military reservation was under the exclusive jurisdiction of the United States at the time of the murder."

The case of Benson v. United States, 146 U. S. 325, 330, 331, 13 Sup. Ct. 60, 36 L. Ed. 991, is to the like effect.

Again, we think the averment that "on the 21st day of September, A. D. 1915, constitutional and exclusive jurisdiction over the site of said lot, tract and parcel of land was ceded to the United States of America by the said state of Texas in the manner provided by law," is a sufficient averment of a cession for one of the purposes enumerated in the third subdivision of section 272 of the Penal Code, and which authorize the United States to accept such a cession, upon the principle that public acts of public officials are presumed to be rightly executed. The application for the cession, the cession, and its acceptance were acts done by the respective federal and state officials in the line of their official duties, and are presumed from the cession and its acceptance to have been properly done, especially when, as in this case, possession and exercise of jurisdiction follow the grant. 12 Cyc. 389.

[5] Article 5275 of the Revised Civil Statutes of Texas (1911) authorized the Governor, upon written application being made to him for that purpose by the United States, accompanied with proper evidence of the acquisition by the United States "for any of the purposes and in either of the modes authorized by this title" of lands, which are described therein by metes and bounds, to cede exclusive jurisdiction over such lands to the United States. That title (article 5275) authorizes the United States to acquire lands in Texas as sites on which to erect and maintain postoffices. When the Governor executes the cession, it will be presumed that the requirements of that act (R. S. Texas 1911, arts. 5252, 5275, 5276) and of the United States Penal Code have been complied with.

The plaintiff in error also questions the authority of the Governor, under the general power conferred by article 5275, supra, to cede jurisdiction in specific instances without legislative direction in each specific case. We do not agree that article 5275 delegates legislative power to the Governor. The blanket consent of the state is contained in article 5275 for all government-acquired lands, upon certain terms and conditions. The Governor is empowered to determine when the conditions that make the legislative consent applicable have occurred. That there is no unconstitutional delegation of legislative power to the executive in this is consistent with the holding of the Texas Court of Criminal Appeals in the case of Baker v. State, 47 Tex. Cr. R. 482, 83 S. W. 1122, 122 Am. St. Rep. 703, 11 Ann. Cas. 751, and of the

Supreme Court of the United States in the case of Field v. Clark, 143 U. S. 649, 694, 12 Sup. Ct. 495, 36 L. Ed. 294.

[6] The plaintiff in error also assigns error based upon the action of the District Court in permitting certain deeds and other muniments of title to go to the jury without proper proof of their execution. The United States was in possession, through contractors, engaged in excavating for a post office, of the land where the murder was committed, when it was committed. The defendant himself was a contractor under the government, and claims to have been rightfully on the premises, when he killed Hermes, by virtue of that relation to the government. The witnesses orally described the place of the killing as the post office site. In this state of the record, the government was not required to prove its title, as in an action of trespass, and the introduction of the deeds and title documents could not have injured the defendant, whether technically proven or not. In the case of Holt v. United States, 218 U. S. 245, 251, 31 Sup. Ct. 2, 6 (54 L. Ed. 1021, 20 Ann. Cas. 1138), the Supreme Court said:

"Several objections were taken to the admission and sufficiency of evidence. The first is merely an attempt to raise technical difficulties about a fact which no one really doubts, namely, that the band barracks, the undisputed place of the crime, were within the exclusive jurisdiction of the United States. A witness testified that they were within the inclosure of Ft. Worden under military guard and control, from which all unauthorized persons are excluded, and that he knew that the fence was coincident with the boundaries shown on a map objected to, but admitted. He identified the band barracks as described in certain condemnation proceedings. The state of Washington had assented by statute to such proceedings and Congress had authorized them. The deeds and condemnation proceedings under which the United States claimed title were introduced. The witness relied in part upon the correctness of official maps in the Engineers' Department made from original surveys under the authority of the War Department, but not within his personal knowledge, and he referred to a book showing the titles to Ft. Worden compiled under the same authority. The documents referred to are not before us, but they properly were introduced, and so far as we can see justified the finding of the jury, *even if the evidence of the de facto exercise of exclusive jurisdiction was not enough, or if the United States was called on to try title in a murder case.* We think it unnecessary to discuss this objection in greater detail."

[7] Another group of assignments of error present the correctness of the rulings of the District Court upon the applicable law of self-defense. The District Judge charged the jury that the defendant might owe the deceased a duty to retreat under certain conditions, though the deceased was approaching him with a knife in his hand. The plaintiff in error's contention limits the duty to retreat to cases in which the deceased assaults his slayer without a deadly weapon. A tendency of the evidence was to the effect that the deceased, Hermes, approached defendant with an open knife in his hand, with which he attempted to strike defendant. The evidence without conflict showed that the defendant, on the approach of Hermes, retreated 20 or 25 feet to where he had left his raincoat, in which was his pistol, and, after obtaining his pistol from it, stood his ground, using his pistol with fatal effect on Hermes. The defendant was rightfully where he was at the time of the quarrel, but was not on his own premises. These facts make

pertinent the question whether one who is assailed by another with a deadly weapon is under all circumstances excused, by that circumstance, from any duty to retreat from his assailant, if himself without fault in provoking the assault.

This is the contention of the plaintiff in error's counsel urged in an able argument and brief. We are not convinced by it that there is a hard and fast rule that he who repels an assault made by another with a deadly weapon may, because of the character of the weapon used by his assailant, repel force with force to the extent of taking life, without retreating, though he could retreat with safety to himself. In the case of Beard v. United States, 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086, the Supreme Court held that one who was assaulted on his own premises, though not in his dwelling house, could repel the assault to the extent of taking his assailant's life, if necessary, without retreating. In the case of Alberty v. United States, 162 U. S. 499, 505, 16 Sup. Ct. 864, 40 L. Ed. 1051, the Supreme Court held that one who killed another, who, in the nighttime, was endeavoring to enter the window of a room, in which was his wife, and who, upon the approach of the defendant, threatened to kill him, and made demonstrations to that end, was justified in killing the deceased, without retreating to avoid doing so. In the former case, the Supreme Court quotes from cases in other jurisdictions, and apparently with approval, the language of the opinions in which would indicate that the duty of one to retreat, when violently assaulted, had no place in modern criminal law. However, in the subsequent case of Allen v. United States, 164 U. S. 492, 497, 17 Sup. Ct. 154, 156 (41 L. Ed. 528) the Supreme Court held the charge of the trial court to be correct, which contained this language:

"The law of self-defense is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character, or that may produce great bodily harm, against which you can exercise a deadly attack. If he is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm from which death or permanent injury may follow, in such a case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, *such as retreating as far as he can, or disabling him without killing him, if* it be in his power. The act coming from the assailant must be a deadly act, or an act that would produce great violence to the person, under this proposition. It means an act that is hurled against him, and that he has not created it, or created the necessity for it by his own wrongful, deadly or dangerous conduct—conduct threatening life. *It must be an act where he cannot avoid the consequences. If he can, he must avoid them, if he can reasonably do so with due regard to his own safety.*"

Of this charge, the Supreme Court said:

"Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he could before slaying his assailant that conflicts with the ruling of this court in Beard v. United States, 158 U. S. 550 [15 Sup. Ct. 962, 39 L. Ed. 1086]. That was the case of an assault upon the defendant upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house. So, too, in the case of Alberty v. United States, 162 U. S. 499 [16 Sup. Ct. 864, 40 L. Ed. 1051], the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the nighttime, and

it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. *The general duty to retreat, instead of killing, when attacked, was not touched upon in these cases.* Whart. on Homicide, § 485."

It is true that the assault on the defendant in the Allen Case, as shown by the statement of facts on a former appeal, was not made with a deadly weapon; but the Supreme Court assumed, as did the trial court, that the facts in the record showed it might have been made under circumstances that created a necessity for repelling it, either without retreating or only after having retreated, as the jury might infer. The general rule as to the duty of retreat is set out by Wharton in the section cited by the Supreme Court as follows:

"In case of personal conflict, it must appear, in order to establish excusable homicide in self-defense, that the party killing had retreated, either as far as he could, by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault would permit him. * * * The true view is that a 'wall' or 'ditch' is to be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to attack the pursuer. And retreat need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death."

When the person assaulted is not on his own premises or in his own house, and is not engaged in preventing an independent and forcible felony, but, while engaged in a personal and unprovoked conflict, is seeking to defend his own life, we think the proper rule is that, before repelling force with force, to the extent of taking life, he must retreat to avoid injury to himself, provided that he can retreat with reasonable safety to himself, unless the circumstances are such as would lead a prudent man reasonably and in good faith to believe that, contrary to the facts, retreat would bring upon him danger to his life or limb. This issue is to be determined by the jury from all the attendant facts, and does not depend upon the existence of one alone, for illustration, the use by the assailant of a deadly weapon. It is manifest that an assault with a knife, as distinguished from a gun, might be made from such a distance as that the person assaulted could by retreat escape with no risk. The law, in its tenderness for human life, does not authorize the taking of life to repel such an assault.

An assault without a deadly weapon, because of great disparity of strength, might become fatal if the assailant closed with his adversary. If the manifest purpose of the strong assailant was to kill or rape, then the weak person assaulted might be able to attain safety only by repelling it from a distance, by shooting the assailant. We think it clear that the Beard and the Alberty Cases are exceptions only to a general rule, which requires retreat where, in fact and appearance, retreat is safe, and that the general rule applies to the facts of this case. The deceased approached the defendant in the daytime from a distance. If he had a weapon, it was a knife only, and not formidable at a distance. The defendant had time to, and did, retreat 25 feet, to get his pistol. If the jury believed that he could, by further retreat, have avoided injury, and that a reasonably prudent man would have drawn this conclusion from the circumstances and character of the assault, then it

was the defendant's duty to have retreated, and, failing to do so, he is not to be excused for killing the deceased. The court was not in error in imposing this limited duty of retreat upon the defendant.

The charge of the court is criticized for not defining a deadly weapon. It contains a definition of that term which we think sufficient. The court's charge left to the jury to determine which was, in fact, the fatal shot of the four fired by the defendant, and permitted the jury to acquit the defendant of responsibility for murder because of the fourth shot, if they found that the third was the only fatal one. The charge is also criticized because of the asserted repeated references to the duty to retreat contained in it. We do not think there was unwarranted iteration in this respect. There was a portion of the charge that omitted reference to the element of apparent, as distinguished from actual, danger to be apprehended from the alleged assault on defendant by the deceased. No exception was reserved to this part of the charge separately, and no ground of exception to the charge in its entirety covers the point. The charge, in other portions, covered the doctrine of apparent danger. The omission in the part complained of would doubtless have been supplied, if the court's attention had been directed to it before submission to the jury. No reversible error can be predicated upon an omission, first complained of after verdict. We think the charge of the court fairly covered the law of the case.

The plaintiff in error assigns the refusal of a number of special requests to charge. Of them, without specific reference to each, we may say that those that asserted correct legal propositions were substantially charged in the general charge of the court.

Finding no reversible error in the record, the judgment is affirmed.

(257 Fed. 54)

WHITE OAK FUEL CO. v. CARTER et al.*

(Circuit Court of Appeals, Eighth Circuit. April 4, 1919.)

No. 5268.

CONTRACTS ⟹267—RIGHT OF RESCISSION—PARTY HIMSELF IN DEFAULT.

The right to repudiate a contract for the default of the other party thereto cannot be exercised by a party who is himself in unexcused default of performance of an essential covenant thereof.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by Bertram U. Carter and others against the White Oak Fuel Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

John P. Leahy, of St. Louis, Mo. (John V. Lee, of St. Louis, Mo., on the brief), for plaintiff in error.

Chase Morsey, of St. Louis, Mo. (Matt G. Reynolds, of St. Louis, Mo., and W. D. P. Farthing, of East St. Louis, Ill., on the brief), for defendants in error.

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*Rehearing denied September 1, 1919.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. The White Oak Fuel Company, hereafter called defendant, entered into a written contract with Carter Bros. Company, hereafter called plaintiff, by the terms of which the defendant agreed to furnish to plaintiff 4 to 6 cars per month of White Oak special 2-inch lump coal, at $1.42½ per ton, and 5 to 8 cars per month of White Oak special 6-inch lump coal, at $1.57½ per ton, free on board plaintiff's switch in East St. Louis, Ill., in regularly scattered monthly shipments beginning August 7, 1916, and ending April 1, 1917. The plaintiff agreed to receive all the coal contracted for, at the place and during the time mentioned, and to pay the agreed price, the payments to be made on or before the 10th of each month for the coal delivered during the preceding month.

The plaintiff brought suit for breach of the contract, and recovered judgment against the defendant, and this proceeding seeks a review of the trial and a reversal of the judgment. The plaintiff alleged a failure of the defendant to deliver the coal contracted for, and the damage suffered as a consequence. The defendant alleged that plaintiff had breached the contract, by refusing to receive the coal and by failing to make monthly payments by the 10th of the month for coal delivered to it in the preceding month, and therefore defendant had rescinded the contract and refused to deliver more coal, and had so notified the plaintiff. The plaintiff's reply denied any refusal to receive coal, and pleaded that the time of payment for the coal delivered was extended by agreement of the parties and was paid for before the expiration of the time thus fixed.

The evidence showed that defendant had furnished only a part of the number of cars contracted to be delivered in each of the months of August, September, and October. There was a conflict of evidence as to whether defendant had offered to furnish and plaintiff had refused to receive more cars in each of these months. The court permitted the plaintiff to show that after the written contract was signed an oral agreement was made, without any new consideration, extending the time of payments to a day in each month much later than provided in the written contract. The plaintiff paid in September for the coal delivered in August, and in October for the coal delivered in September; but the defendant notified plaintiff before the 10th of November that, unless it paid its bills promptly that month for the coal delivered in October, there would be no more coal shipped under the contract. The plaintiff did not pay for the coal delivered in October until November 22d, and no coal was delivered to plaintiff under the contract after October.

The case was submitted to the jury, conditioning plaintiff's right to recover on the absence of any offer by defendant to furnish more coal in August, September, and October, and of a refusal by the plaintiff to accept it, and also on the existence of a waiver by defendant of the making of payments on the 10th of each month, as provided in the written contract, and the verdict was against the defendant. The ver-

dict must be taken as establishing the fact that the defendant was guilty of an unexcused breach of the contract to furnish the stipulated amount of coal in August, September, and October, and that such default continued and existed at the time the defendant declared it would furnish no more coal under the contract.

The defendant contends that evidence of an oral agreement to extend the time of payments should not have been received, and that it was error to submit to the jury the existence of a waiver of the time of payment derivable only from such evidence. The argument is that the written contract was for the sale of goods of the value of upwards of $50, and that no oral modification of this contract could have been made because of the terms of the statute of frauds, and also because there was no consideration for such oral contract. The plaintiff contends that the time of payment was not of the essence of the contract, and there had been no breach of any of its essential terms by the plaintiff, so that defendant was not justified in declaring it at an end and in refusing further performance, and therefore the question of waiver was not in issue.

As has been stated, the verdict establishes the fact that at the time the defendant attempted to terminate the contract, and when it declared that it would proceed no further thereunder, it was itself in default of performance of an essential covenant of the contract, because it had failed to deliver the agreed amount of coal the plaintiff was to receive in August, September, and October. The right to repudiate a contract for the default of the other party thereto cannot be exercised by a party who is himself in unexcused default of performance of an essential covenant thereof. Chitty on Contracts (15th Ed.) 722; Walds Pollock on Contracts (3d Ed.) 345; Norwood Paper Co. v. Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524; Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 264, 110 Pac. 951; Mason v. Edward Thompson Co., 94 Minn. 472, 103 N .W. 507; Central Lumber Co. v. Arkansas Valley Lumber Co., 86 Kan. 131, 119 Pac. 322; Griffin v. Griffin, 163 Ill. 216, 45 N. E. 241; Reddish v. Smith, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781; John A. Gauger Co. v. Sawyer & Austin Lumber Co., 88 Ark. 422, 115 S. W. 157; Norris v. Letchworth, 167 Mo. App. 553, 152 S. W. 421; 2 Black on Rescission, § 553; 13 Corpus Juris, 614.

The court should have instructed the jury that if there was no breach of the contract, because of the plaintiff's refusal to receive coal offered by the defendant in fulfillment of the contract, the plaintiffs were entitled to recover. It was therefore not error of which defendant can complain that the court also submitted the existence of an agreement by defendant to waive the making of payments promptly by the 10th of each month, and conditioned plaintiff's recovery on findings in favor of plaintiff on both propositions.

Complaint is made because the court refused to permit an employé of the defendant to testify what the defendant's president had said in September over the telephone, after he had called up the plaintiff with reference to payment for the coal. It follows from what has been said, that whatever was said on this subject was an immaterial matter of in-

quiry at the trial, because the plaintiff's default of payment was not properly an issue in the case. There was therefore no error in excluding this evidence.

This disposes of all the material assignments of error. The judgment will be affirmed.

(257 Fed. 57)

WEEMS et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5236.

1. CRIMINAL LAW ⟹1036(8)—APPEAL—SUFFICIENCY OF EVIDENCE.
   Failure of witnesses to clearly identify a city mentioned in their testimony *held* waived, where the omission was not called to the attention of the trial court.
2. INTOXICATING LIQUORS ⟹236(1)—PROSECUTION FOR INTRODUCING INTO PROHIBITION STATE—SUFFICIENCY OF EVIDENCE.
   Evidence in a prosecution for introducing liquors into a prohibition state *held* sufficient to justify submission of the case to the jury.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against Frank Weems and Frank Bussey. Judgment of conviction, and defendants bring error. Affirmed.

John M. Goldesberry, of Collinsville, Okl. (Archibald Bonds, of Muskogee, Okl., on the brief), for plaintiffs in error.

C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The defendants, Frank Weems and Frank Bussey, were indicted and convicted for introducing a large quantity of intoxicating liquors into the state of Oklahoma. The evidence tended to show that the parties shipped two trunks from Kansas City to a town in Oklahoma. Special agents opened these trunks at Kansas City, and found that one of them contained two and the other one cask of whisky. These trunks were checked on tickets upon which one or both of the defendants entered the train at the Union Station. The special agent, by inspecting the records in the baggage office, found the number of the tickets for which the checks were issued, and then watched for the passenger or passengers presenting the tickets at the gate and the train. This agent was unable to state whether the trunks were checked on two different tickets, or only one, but clearly identified one of the tickets corresponding to the checks, and then traced the parties into a sleeper at Kansas City. The special agent then phoned to a special agent in Oklahoma, who got on the train one station from the place for which the tickets read. The parties, instead of going

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to the station, got off at a water tank about half a mile back. They left the sleeper on the side opposite the station. The officer watched them under the train, and followed them around the rear. By that time they were retreating. He gave pursuit, and as soon as they say they were followed they started to run. They dropped two suit cases which were well loaded with whisky. An overcoat was picked up, bearing the identification marks of Frank Weems, and containing a letter addressed to his wife. The parties escaped, and the defendants were not apprehended for two or three days. The trunks were put off at the station, and one of them contained two casks and the other one cask of whisky. The identification of the parties who got off the train, as the defendants, was not very clear; but there was evidence identifying one of the parties as one of the men who held the tickets and boarded the train at Kansas City. This, and the other circumstances to which we have referred, constitute the evidence upon which the case was submitted to the jury.

[1] There are two matters complained of—one, that the Kansas City referred to by the witnesses is nowhere identified as Kansas City, Mo. The whole testimony, however, shows with reasonable clearness that that was the city which the witnesses had in mind. The train started from there. They constantly referred to the Union Station at Kansas City. It is also true that this question was not raised in any way at the trial. It could easily have been corrected, and we think it was waived by not being specifically called to the attention of the court.

[2] The other assignment of error is based upon a motion at the conclusion of the evidence to return a verdict of not guilty. We think there was sufficient evidence to justify submitting the case to the jury.

The judgment is therefore affirmed.

(257 Fed. 58)

ELDRED et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5235.

PUBLIC LANDS ⚷120—SUIT FOR CANCELLATION OF PATENTS—FRAUDULENT ENTRIES.

The United States *held* entitled to cancellation of patents for soldiers' homesteads which were taken by the entrymen under contracts to convey to another, who paid all expenses and the agreed price on conveyance after final proof.

Appeal from the District Court of the United States for the District of Nebraska; Martin J. Wade, Judge.

Suit in equity by the United States against Everett M. Eldred and others. Decree for the United States, and defendants appeal. Affirmed.

William F. Gurley, of Omaha, Neb. (David A. Fitch, of Omaha, Neb., on the brief), for appellants.

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T. S. Allen, U. S. Atty., of Lincoln, Neb. (Howard Saxton, Asst. U. S. Atty., of Omaha, Neb., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This is a suit in equity by the United States against the defendant Eldred to cancel patents obtained upon soldiers' homestead entries. The trial court found the entries to be fraudulent and entered a decree in favor of the government. The defendant appeals.

The defendant is a prosperous ranchman living in Deuel county, Neb. He had been occupying large tracts of public domain, inclosing the same by fences, as a part of his ranch. He had been ordered to remove the fences. To meet this emergency he went to Saline county, Neb., and induced a large number of old soldiers to locate homestead entries on the land under the Kincaid Act. He paid their expenses from the time they started; he selected their claims, erected improvements upon them, boarded the claimants while they were carrying on their pretended residence, and paid the expenses of making final proof. As soon as the entrymen obtained their patents, he paid each of them $500 for his homestead, in exact accordance with the agreement which he made with them when he first saw them. If such a fraud as this could be sustained, there would be no limit to the amount of public lands which could be obtained through dummy entrymen. This is not the law. On the contrary, the law has of late years been going steadily against such practices. United States v. Richards (D. C.) 149 Fed. 443, 175 Fed. 911; Booth-Kelly Lumber Co. v. United States, 237 U. S. 481, 35 Sup. Ct. 659, 59 L. Ed. 1058; United States v. Moorhead, 243 U. S. 607, 37 Sup. Ct. 458, 61 L. Ed. 926.

The judgment is affirmed.

(257 Fed. 59)

HAMLIN et al. v. GROGAN.*

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5219.

1. APPEAL AND ERROR ⟹1009(1)—REVIEW ON APPEAL—FINDINGS OF FACT.
   A finding of fact by a chancellor, who heard the witnesses, will not be reversed, except in a clear case.
2. MARRIAGE ⟹50(5)—PROOF OF CONTRACT—CIRCUMSTANTIAL EVIDENCE—COHABITATION AND REPUTATION.
   A contract of common-law marriage may be shown as an inference of fact from cohabitation, declarations of the parties, and reputation among friends and kindred.
3. MARRIAGE ⟹40(11)—PRESUMPTION OF LEGALITY.
   Where a contract of marriage is proved, the burden of proof rests upon the party contesting it to show that one of the parties was not qualified to enter into the contract by reason of an existing prior marriage.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied December 1, 1919.

Bill of interpleader in equity by Oscar T. Hamlin, administrator, against George H. Grogan and others. Decree for defendant Grogan, and complainant and the other defendants appeal. Affirmed.

Oscar T. Hamlin, of Springfield, Mo. (Lou L. Collins and Willard W. Hamlin, both of Springfield, Mo., on the brief), for appellants.

G. M. Sebree, of Springfield, Mo. (W. J. Orr, of Springfield, Mo., Frank P. Sebree, of Kansas City, Mo., and L. R. Patton, of Galveston, Tex., on the brief), for appellee.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. [1] The controversy in this suit turns upon the question whether appellee, George H. Grogan, was the husband of Eliza Grogan at the time of her death. There is no charge of adultery or bigamy. It is entirely a matter of who is entitled to the estate of Mrs. Grogan. The marriage was established by cohabitation, by both of the parties holding themselves out as husband and wife, and by documentary evidence in the handwriting of Mrs. Grogan. The case was carefully tried by an able and experienced judge. He found in favor of the marriage. His finding is amply supported by the evidence. Unless we are to completely disregard the rule that the finding and decree of a chancellor, who has heard the witnesses, will not be disturbed, except in a clear case, the decree ought to be affirmed. Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Coder v. Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; Silver King, etc., Mining Co. v. Silver King Consolidated, etc., Co., 204 Fed. 166, 177, 122 C. C. A. 402. We have carefully read the record, and, if we were trying the case ourselves, we should reach the same conclusion as that arrived at by the chancellor. No questions of law are presented, except such as are deeply involved in the primary question of fact. We do not feel that any good purpose would be served by an elaborate marshaling of the testimony to justify the decree. Each case involving such a controversy must turn upon its own evidence. The law is well established, and has been recently declared by the Supreme Court and by this court. Travers v. Reinhardt, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865; Great Northern Ry. Co. v. Johnson, 254 Fed. 683, 166 C. C. A. 181.

[2] The most serious of appellants' contentions is that in the case of a common-law marriage the contract between the parties must be proven as a tertium quid anterior to and independent of cohabitation, declaration of the parties, and manner of life. Such is not the law. By the overwhelming weight of authorities the contract may be shown as an inference of fact from cohabitation, declarations, and reputation among friends and kindred. In such a case the fact of contract is not a "presumption," but is a fact proven by circumstantial evidence. Such circumstantial evidence, if clear and persuasive, establishes the existence of the contract of marriage between the parties as satisfactorily as if the contract had been reduced to writing, or had been expressed in the presence of living witnesses in the plainest form of contractual

words. The cases are fully reviewed in Travers v. Reinhardt, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865. The law on the subject received an accurate statement by one of the greatest judges of our race in the language of Lord Westbury quoted in the Travers Case at page 441 of 205 U. S., at page 569 of 27 Sup. Ct. (51 L. Ed. 865). See, also, Nelson v. Jones, 245 Mo. 579, 151 S. W. 80; Betzinger v. Chapman, 88 N. Y. 488; Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; 18 Ruling Cases, 421, §§ 46 and 57, and cases there cited.

[3] The foregoing view as to the proof of the contract of marriage answers the contention of appellants that the trial court in reaching its conclusion proceeded by resting the presumption of the contract of marriage upon the presumption that appellee's former marriage had been terminated in some lawful way. No such double presumption exists in the reasoning of the trial judge. As already stated, the existence of the marriage contract between Mr. and Mrs. Grogan is proven as a fact by circumstances, and does not rest upon a presumption. So the court could properly base its decree upon the presumption that Grogan was qualified to enter into the contract of marriage by reason of his former marriage having terminated in some lawful way. It is also true that the burden of proof as to the existence of the former marriage at the time of entering into the second contract was upon appellants. They could discharge that burden only by proof. It could not be done by the metaphysics of presuming that the former wife was still living, and the marriage with her in force.

The decree is affirmed.

(257 Fed. 61)

HEYNACHER v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919.)

No. 5210.

1. CRIMINAL LAW ⟹1134(3)—APPEAL—NECESSITY OF REVIEW.

Where the punishment imposed did not exceed that authorized for one of two offenses, if no error was committed in respect to such offense, the other need not be considered.

2. ARMY AND NAVY ⟹40—ESPIONAGE ACT—VALIDITY.

Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c) is valid. The obstruction of the military service of the United States need not be by physical acts, but may be by written or spoken words, and the government is not required to show that some particular person was dissuaded from entering the service.

3. CRIMINAL LAW ⟹683(1)—ESPIONAGE ACT—REBUTTAL EVIDENCE.

In a prosecution for violating Espionage Act, tit. 1, § 3 (Comp. St. 1918, § 10212c), by attempting to cause disloyalty in the military forces and by obstructing recruiting, a letter from defendant to the president of the German-American Alliance of his state, inclosing a newspaper clipping telling of the escape of a German soldier, who told of the brutality of German officers, conditions behind the German lines, etc., with defendant's comment, "What kind of a swine is this?" *held* admissible to rebut the effect of defendant's evidence that he was a member of the Red Cross and gave free posting to army and navy advertisements on his bill boards, etc.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

 *Rehearing denied September 1, 1919.

In Error to the District Court of the United States for the District of South Dakota; Jas. D. Elliott, Judge.

Walter Heynacher was convicted of violating the Espionage Act, and he brings error. Affirmed.

W. F. Mason, of Aberdeen, S. D., for plaintiff in error.

Robert P. Stewart, U. S. Atty., of Deadwood, S. D. (Edmund W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D., and George Philip, of Rapid City, S. D., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. [1] The plaintiff in error was convicted of violations of section 3, title 1, of the Espionage Act of June 15, 1917 (40 Stat. 217 [Comp. St. 1918, § 10212c]), charged in two counts of an indictment—first, by causing and attempting to cause disloyalty, etc., in the military forces of the United States; and, second, by obstructing the recruiting and enlistment service of the United States when it was at war with the Imperial German government. The sentences under the two counts were the same and were to run concurrently. The punishment imposed did not exceed that authorized by the statute for the latter offense, consequently if no error was committed in respect of that offense the other need not be considered. Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830.

[2] The charge was that on or about December 15, 1917, the accused willfully obstructed the recruiting and enlistment service by publicly saying to a young man who was eligible to enlistment and subject to conscription:

> "That he should not enlist; that the present war was all foolishness and (a vulgar word which need not be repeated), and that my talk of enlisting was all nonsense; that the war was for the big bugs in Wall Street; that it was all foolishness to send our boys over there to get killed by the thousands, all for the sake of Wall Street; that he should not go to war until he had to."

There was substantial evidence in support of the verdict and it need not be recited here. The constitutionality of the clause of the Espionage Act in question, that the obstruction of the service need not be by physical act but may be by written or spoken words, and that the government is not required to show that some particular person was dissuaded from entering the service, have been so frequently decided by this and other courts that reference to the many cases is unnecessary. In Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (March 3, 1919), the court said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

See, also, Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566 (March 10, 1919).

The indictment and the evidence at the trial were sufficient under the statute.

[3] There is a complaint about the admission of evidence. In defense the accused showed that he was a member of the Red Cross and that he gave free posting on a system of billboards which he controlled of advertisements for the army and navy, the various government war loans, and the food and fuel administrations, amounting in value to several hundred dollars. This was to show his loyalty and the want of unlawful intent, and to give strength to his version of the language he used, which was quite different from that set forth in the indictment and testified to by witnesses for the government. To rebut this the government introduced as part of the cross-examination a letter of November 27, 1917, from the accused to the president of the German-American Alliance of his state, and a newspaper clipping inclosed with the letter. In the letter was the sentence:

"I cannot understand that you still won't recognize the services of Hans Demuth for the German interests of South Dakota."

This in itself was probably not very significant, but the newspaper clipping was an account of the escape of a certain German soldier to this country, who told of the brutality of some German officers, conditions behind the German lines, etc. Upon this clipping the accused had written, "What kind of a swine is this?" It is contended that the court erred in receiving this evidence, but it is clear that it was properly admitted. It tended to show that the public manifestations of loyalty on which the accused relied for the purposes mentioned should not receive the full consideration he claimed for them. There is nothing else in the assignments of error that is substantial.

The sentence is affirmed.

(257 Fed. 63)

CULVER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 1, 1919.)

No. 5193.

CRIMINAL LAW ⟹1170½(6)—REVIEW—PREJUDICIAL ERROR—CROSS-EXAMINATION OF DEFENDANT.

In a criminal prosecution for using the mails to defraud, it was prejudicial error to permit counsel for the government, on cross-examination of defendant, to inquire as to the property he owned at the time of the alleged offense and at the time of trial, even though some of such questions were excluded.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against John Culver. Judgment of conviction, and defendant brings error. Reversed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

W. J. Crump, of Muskogee, Okl., for plaintiff in error.

C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. John Culver, one of the defendants below in this case, complains of error in his trial and conviction for devising a scheme to use the mails to defraud J. Moncrief, who, under the names of the Dyer-Bates Company of Winfield, Kan., and the Winfield Nursery Company, a corporation, owned and was selling nursery stock. On May 10, 1915, Moncrief made a contract with E. J. Luce, who was indicted and convicted with Culver, to furnish to him, at prices specified, nursery stock to fill orders to be taken by him from third parties on blanks to be provided by Moncrief, and Luce agreed to procure all his nursery stock from Moncrief, to pay him 10 per cent. interest on money he borrowed from Moncrief, and not to ask him for a loan of more than 20 per cent. of the orders he turned in. Under this contract Luce procured orders for nursery stock, turned them over to Moncrief, and borrowed from him or procured advances from him of about 20 per cent. of the amount of the orders for nursery stock. Culver was employed by Luce on a commission, or on a salary, or in some other way, to procure some of these orders which Luce caused to be mailed to Moncrief.

The scheme to defraud, which the government alleged in the indictment that Luce and Culver devised, was to obtain forged or otherwise worthless orders for nursery stock, to represent that the orders were genuine and valuable, that the makers were real persons when they were fictitious persons, that they were financially responsible when they were not, and to borrow 20 per cent. of the amounts of the orders, and never to pay it back. There was a long trial, and much conflicting testimony regarding the orders that were obtained, and the character of them, but no testimony regarding the property of Culver or his financial responsibility, nor was he a party to the contract between Moncrief and Luce. After the plaintiff had rested its case in chief, and Culver had testified for the defense upon his examination by his counsel, who asked him nothing about his property, counsel for the government on his cross-examination inquired of him whether or not he owned property of his own in Muskogee, where he lived in the summer of 1915, when these orders for nursery stock were taken. He answered that he did not. Asked if he then owned his own home, he answered that he did not. Asked if he owned considerable property at the time of his examination, he answered, "Well, right smart; yes." Asked if he owned his own home in Muskogee, he answered, "Yes, sir." Asked if he owned several farms, he answered, "Yes, sir." Asked how many farms he owned, his counsel objected to this question as incompetent, irrelevant, and immaterial. The court overruled the

objection, and the defendant answered, "Well, about one." The examination then proceeded in this way:

"Q. You own quite a lot of city property? A. Well, I can't say that; I—I own some; yes, sir.

"Q. What do you value your present property at? A. Well, I have never—

"Mr. Crump (counsel for Mr. Culver): I want to renew my objection, if your honor please.

"The Court: Objection sustained.

"Q. You recently bought one farm that you paid about something over $20,000 for, did you not?

"Mr. Crump: I object to that as incompetent, irrelevant, and immaterial.

"The Court: Sustained.

"Q. You have two automobiles for private use? A. I have not—

"Mr. Crump: I object to that, if your honor please.

"The Court: Sustained.

"Q. What business have you been engaged in since 1915 to the present time? A. Real estate.

"Q. You have accumulated all this money in the course of your business? A. Well, pretty well all of it.

"Q. Most all of it? A. Yes.

"Q. Well, just please state to the court how you acquired the principal part of the property that you have at this time.

"Mr. Crump: I object as incompetent, irrelevant, and immaterial, and not tending to prove any issue in this case.

"The Court: Sustained."

The first ruling of the court, that it was competent, relevant, and material in this case for the government to show how many farms Mr. Culver owned, was clear error. That issue was not in the case, and the number of farms he owned had no relevancy to the issues that were in the case. The court properly ruled upon the next question, that the value of Mr. Culver's property was immaterial, and the subsequent questions of the counsel for the government, such as "You recently bought one farm that you paid something over $20,000 for?" and "You have two automobiles for private use?" constituted a clear and injurious abuse of the right of examination of this witness. The entire examination upon this subject was clearly inspired for the purpose of, and intended to lodge in the minds of the jury by insinuation, the idea that Mr. Culver had accumulated property by means of the alleged fraudulent scheme charged in the indictment. It was error to enter upon the examination, it was error to permit any evidence on the subject, and the error here permitted cannot fail, in our opinion, to have prejudiced the defendant in the trial of his case.

The judgment below is accordingly reversed, and the case is remanded to the court below for a new trial.

(257 Fed. 66)

McGREW v. BYRD.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1919.)

No. 5105.

EJECTMENT ⟹13—TITLE TO SUPPORT ACTION.

In the federal courts one cannot recover land in an action of ejectment on an equitable title only.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by Abraham R. Byrd against Elias Vincent McGrew. Judgment for plaintiff was reversed on error. 255 Fed. 759, 168 C. C. A. 196. On petition for rehearing. Denied.

John T. McKay, of Kennett, Mo., for plaintiff in error.

Robert Burett Oliver, of Cape Girardeau, Mo. (Robert Burett Oliver, Jr., and Allen Laws Oliver, both of Cape Girardeau, Mo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. In an opinion filed January 15, 1919, the judgment of the District Court was reversed on a number of grounds, and the cause remanded, with directions to grant a new trial.

One of the grounds upon which the cause was reversed was that the court erred in granting a peremptory instruction to the jury to return a verdict for the plaintiff, although there was substantial evidence that at the time the deed to William Pruett, under whom the defendant in error claimed title, was executed by Dunklin county, Mo., he was dead, and we held that—

"As there was substantial evidence to warrant a finding by the jury that William Pruett, the grantee of the plaintiff, and under whom plaintiff claims title, was, at the time the patent was issued by the county court, dead, the court erred in refusing to submit the case to the jury under proper instructions on that issue."

A request for an instruction to that effect had been made by the plaintiff in error. This ground of reversal is not questioned by counsel in his petition, nor in the brief filed with the motion for rehearing. This alone necessitates a denial of the petition for rehearing.

But as the cause will have to be retried, and the trial court will be bound by what was determined by this court on the admission of evidence which had been objected to at the trial by the plaintiff in error, and by the court overruled, we deem it proper to pass upon these points raised by the petition for rehearing.

In our opinion we held that the court erred in admitting a certified copy of the register's certificate of purchase by William Pruett, holding that there is no statute of the state of Missouri requiring such a record to be kept, citing Nall v. Conover, 223 Mo. 477, 122 S. W. 1039, and Whitman v. Giesing, 224 Mo. 600, 123 S. W. 1052, to sustain our ruling.

Another ground upon which we held that the certified copy of the register's certificate of purchase by William Pruett was inadmissible is that under the statute, regulating the sales of swamp lands, the certificate of the register is merely evidence of the fact that an application for the purchase of the lands had been made, but that the purchase money could only be paid and received by the receiver. We said:

"A person may apply to the register to purchase the lands, but until the purchase money has been paid to the receiver, and receipts therefor issued in triplicate, no patent could be issued by the county court."

Counsel now claim that the Missouri cases cited by us have since been overruled by the Supreme Court of that state in Mosher v. Bacon, 229 Mo. 338, 129 S. W. 680, and Russ v. Sims, 261 Mo. 27, 169 S. W. 69. We cannot agree with counsel in this contention. These were equitable actions to quiet title under the statutes of the state of Missouri. In neither of these cases were the cases cited by us in the opinion referred to. In Mosher v. Bacon the court held that as the evidence was undisputed that the original patentee of the lands in controversy had paid the full purchase price therefor to the county, and complied fully with all the provisions of the statute, he had an equitable title to the lands. The court held:

"The equitable title is at least passed, for the purchase money is paid, and the state cannot transfer her title, which is a mere naked legal title, to another."

This was followed in Russ v. Sims, where the receiver's receipt for the purchase money was also introduced. In the case at bar no evidence of payment to the receiver was attempted to be introduced.

But this is not an action to quiet title, but strictly an action at law of ejectment. That one cannot, in the national courts, recover lands in an action of ejectment on an equitable title only, is well settled. Langdon v. Sherwood, 124 U. S. 74, 8 Sup. Ct. 429, 31 L. Ed. 344; Johnson v. Christian, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412; Schoolfield v. Rhodes, 82 Fed. 153, 27 C. C. A. 95; Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 107 C. C. A. 93. And this rule prevails in the state of Missouri. Ables v. Webb, 186 Mo. 233, 85 S. W. 383, 105 Am. St. Rep. 610; Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780.

Nor does Russ v. Sims sustain the contention that the register's record of applications for the purchase of swamp lands, or a certified copy thereof, is admissible in evidence. What the court did hold was that, as the act of 1901 (Laws of Missouri 1901, p. 251), known as the Carlton Act, and the act of 1907 (Laws of Missouri 1907, p. 271), made the abstracts prepared by one Carlton from the register's and receiver's books, which were at the time supposed to have been destroyed, prima facie evidence of land titles in Pemiscot county, the original books from which the abstracts were made, when found, were also admissible. The court clearly based its decisions upon those special acts. Had the court intended to overrule its former decisions, as claimed by counsel, it certainly would have so

stated, especially in view of the fact that the opinion in Russ v. Sims was written by the same judge who wrote the opinion in Whitman v. Giesing.

The petition for rehearing is denied.

(257 Fed. 68)

ÆTNA INS. CO. et al. v. DAVIDSON S. S. CO. (two cases).

DAVIDSON S. S. CO. v. BACON.

(Circuit Court of Appeals, Seventh Circuit. December 17, 1919.)

No. 2455.

1. APPEAL AND ERROR ⟹1012(1)—FINDINGS OF FACT—REVIEW.
Where trial judge saw and heard the witnesses, findings upon issues of fact will not be set aside, unless the cold type in the record demonstrates findings either were unsupported by the evidence, or were made in the face of a preponderance to the contrary.

2. WHARVES ⟹20(2)—WHARFINGER'S LIABILITY FOR DAMAGES TO VESSELS.
Though a wharfinger is not a guarantor of safety, he must use reasonable diligence to ascertain the condition of the berths into which he invites vessels, and a navigator has the right to assume that such care has been exercised, and a wharfinger is liable for damages occasioned by a submerged obstruction that was close enough to the dock to be reached by vessels of usual length lying at the dock, and which reasonable diligence on his part would have disclosed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Libels by the Ætna Insurance Company and another against the Davidson Steamship Company and by the Steamship Company against E. R. Bacon, consolidated. From a decree in favor of the Steamship Company, the Insurance Company and others and respondent Bacon appeal. Affirmed.

Charles E. Kremer, of Chicago, Ill., for appellants.

Harvey D. Goulder, of Cleveland, Ohio, for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellee's schooner went to appellant Bacon's elevator at South Chicago to be loaded with corn destined to Buffalo. While at the elevator dock she sprang a leak, and the cargo was somewhat damaged. Appellants, one the owner and the others the insurers, who had paid part of the loss on the cargo, alleged that the leak was due to the unseaworthiness of the schooner and to improper loading by appellee. According to appellee's libel against Bacon, owner of cargo, elevator, and dock, the loading, which was properly done, lowered the schooner so that her keel rested upon and was spilt by a submerged obstruction. On final hearing of the consolidated cases the District Court dismissed appellants' libel, and entered a decree in appellee's favor for the damages to the schooner.

[1] As the trial judge saw and heard the witnesses, his findings

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upon the issues of fact will not be set aside, unless the cold type in the record demonstrates that a material finding either was unsupported by evidence or was made in the face of a clearly ascertainable preponderance to the contrary. Royal Exchange Assurance v. Graham & Morton Transp. Co., 166 Fed. 32, 92 C. C. A. 66; Monongahela River Consol. Coal Co. v. Schinnerer, 196 Fed. 375, 117 C. C. A. 193.

[2] Our study of the reported testimony leaves us under the conviction that the schooner was staunch and seaworthy when loading commenced; that loading was properly conducted; that there was a submerged pile somewhat beyond the limits of Bacon's dock, but so near thereto that vessels of usual length, lying at the dock, would extend to that point; that the obstruction was unknown to appellee; that, though Bacon was also unaware of its existence, reasonable diligence on his part would have disclosed the danger; and that the damages to the schooner and her cargo were wholly due to the submerged obstruction.

Though a wharfinger is not a guarantor of safety, he must use reasonable diligence to ascertain the condition of the berths into which he invites vessels, and the navigator has the right to assume that such care has been exercised. Smith v. Burnett, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756; C. F. Harms Co. v. Upper Hudson Stone Co., 234 Fed. 859, 148 C. C. A. 457.

The decree is affirmed.

(257 Fed. 69)

HIMES v. SCHMEHL.

(Circuit Court of Appeals, Third Circuit. March 28, 1919.)

No. 2427.

1. PARTIES ⟹19—JOINT CONTRACT—JOINDER OF OBLIGEES.
Where a contract is joint, and not several, all the joint obligees or covenantees who are alive must be joined as plaintiffs.

2. TENANCY IN COMMON ⟹55(3)—ACTIONS EX DELICTO—JOINDER.
Tenants in common must join in actions ex delicto for an injury to their common property, though it be real estate, because the damages belong to them jointly.

3. EQUITY ⟹105—PARTIES—CONTRACT—JOINT REMEDY.
The rule that, where the contract is joint, so also is the remedy, likewise prevails in equity.

4. EQUITY ⟹103—DECREE IN ABSENCE OF NECESSARY PARTY.
A decree in equity may not be made, in the absence of a party whose rights must necessarily be affected.

5. COURTS ⟹310—JURISDICTION—NONJOINDER OF NECESSARY PARTY.
Bill by one of two co-owners and lessors of a graphite mine for nonpayment of rent, breach of covenant for good mining, and removal of the property of the lessors, was properly dismissed, where brought by one lessor only, though the joinder of the other would oust the jurisdiction of the court as to the parties before it, despite equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix).

6. PARTIES ⟹15—JOINT CAUSE OF ACTION—JOINDER OF SEPARATE LEGAL ACTIONS.
Where one of two joint lessors sues alone improperly in equity without joining his colessor, joinder in his bill of his independent legal cause of

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action for an indebtedness from defendant lessee to him alone, even if proper, cannot convert the inseparable rights of himself and his colessor into separate rights, justifying his suit without joining his colessor.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit by Hiram C. Himes against Harry A. Schmehl. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Edmund B. Seymour, Jr., of Philadelphia, Pa., for appellant.

Thomas L. Hoskins, of West Chester, Pa., for appellee.

Before WOOLLEY, Circuit Judge, and HAIGHT and MORRIS, District Judges.

MORRIS, District Judge. The appellant, Hiram C. Himes, of New Jersey, plaintiff below, and his co-owner Edmund B. Seymour, Jr., of Pennsylvania by joint contract of lease demised a graphite mine and its equipment to the defendant, Harry A. Schmehl, of Pennsylvania. This suit arises out of that contract and is brought by Himes alone. The contract, made a part of the bill, does not disclose the respective interests of the lessors in the demised property. The rent is made payable to the lessors jointly; not severally as their interests may appear. The remaining covenants likewise run to the lessors jointly. The bill of complaint alleges the ownership in fee by Himes of thirty-one fiftieths interest in the mine, the failure of defendant to account as required by the lease for one-half of the product of the mine reserved as rent, breach of the covenant for good mining, the removal of certain fixtures and other property of lessors from the demised premises, and that the extent of the removals is unknown to the plaintiff. The bill also alleges an indebtedness of the defendant in the sum of $400 for money loaned to him by Himes and Seymour, and a further indebtedness of the defendant in the sum of $75 for money loaned to him by Himes. The bill prays discovery and an accounting for thirty-one fiftieths of the value of the property removed, and for a like share of the rent reserved.

The bill was dismissed under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) for nonjoinder of Seymour as party plaintiff, and for want of jurisdiction. From this decree, plaintiff appeals.

[1-4] It is an elementary rule of the common law that, where a contract is joint and not several, all the joint obligees or covenantees who are alive must be joined as plaintiffs. Farni v. Tesson, 1 Black, 309, 17 L. Ed. 67. A joint contract with several cannot be enforced by one of them alone. Cannon v. Maull, 4 Har. (Del.) 223. In Marys v. Anderson, 24 Pa. 272, the court applied the rule that, where the contract is joint, so also is the remedy, and held that one tenant in common may not maintain an action to recover his share of the rent from the lessee, where the lessee's contract is to pay the rent as a whole to all the lessors. Mr. Justice Daniel, in Calvert et al. v. Bradley et al., 16 How. 580, 597 (14 L. Ed. 1066), said:

"But in this same lease there is a covenant between the proprietors and the lessee that the latter shall keep the premises in good and tenantable repair, and shall return the same to those proprietors in the like condition, and

it is upon this covenant or for the breach thereof that the action of the plaintiffs has been brought. Is this a joint or several covenant? It has been contended that it is not joint, because its stipulations are with the several covenantees jointly and severally. But the answer to this position is this: Are not all the covenantees interested in the preservation of the property demised, and is any one or a greater portion of them exclusively and separately interested in its preservation? And would not the dilapidation or destruction of that property inevitably affect and impair the interests of all, however it might and necessarily would so affect them in unequal amounts?

"It would seem difficult to imagine a condition of parties from which an instance of joint interests could stand out in more prominent relief. This conclusion, so obvious upon the authority of reason, is sustained by express adjudications upon covenants essentially the same with that on which the plaintiffs in this case have sued."

Tenants in common must also join in actions ex delicto for an injury to their common property, even though it be real estate, because the damages belong to them jointly. Bullock v. Hayward, 10 Allen (Mass.) 460. The rule that, where the contract is joint, so also is the remedy, likewise prevails in equity. Railroad Co. v. Orr, 18 Wall. 471, 21 L. Ed. 810. Again, a decree in equity may not be made in the absence of a party whose rights must necessarily be effected by such decree. Shields v. Barrow, 17 How. 130, 15 L. Ed. 158.

[5] The cause of action for nonpayment of rent, breach of covenant for good mining, and removal of property of lessors is therefore in Himes and Seymour jointly. Their remedy is joint. Their interests are inseparable. Any sum awarded by the decree would belong to them jointly. Himes alone has no cause of action therefor.

The bill does not allege any reason for the nonjoinder of Seymour, but plaintiff seeks to excuse his nonjoinder, in that his joinder would oust the jurisdiction of the court as to the parties before the court. That consequence cannot make it regular to proceed without him. It only proves that the court below was not the proper tribunal to settle the controversy. If it be once settled that the suit may not be maintained, save by the joinder of Seymour as a party, Himes cannot set up the limited jurisdiction of the court for not so joining him. Parsons et al. v. Howard, Fed. Cas. No. 10,777. Nor can this result be affected by equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix). California v. Southern Pacific Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683.

[6] The plaintiff further contends that Seymour cannot be made a party plaintiff, as he had no interest in the alleged indebtedness of $75 from the defendant to the plaintiff. This cause of action is independent of the one heretofore considered and is cognizable at law. Its mere joinder in the bill, even if it be properly joined, cannot convert the inseparable rights of Himes and Seymour in the former cause of action into separate rights, or otherwise improve Himes' position with respect thereto.

As the bill of complaint shows that the plaintiff has not a separable cause of action touching the demised property, as the joinder of Seymour as a party would oust the jurisdiction of the court, and as the remaining alleged causes of action are below the jurisdictional amount, the District Court properly dismissed the bill. Its decree is affirmed.

(257 Fed. 72)

ROSENBERG v. SEMPLE.

In re GOTTLEIB & CO.

(Circuit Court of Appeals, Third Circuit. April 5, 1919.)

No. 2439.

1. BANKRUPTCY ⟹160—INSOLVENCY—PROOF.
   Insolvency, within the definition of Bankruptcy Act July 1, 1898, § 1 (Comp. St. § 9585), may, and in many cases must, be proved by proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred.
2. BANKRUPTCY ⟹160—TRANSFER OF ACCOUNTS—INSOLVENCY—SUFFICIENCY OF EVIDENCE.
   Evidence *held* to warrant a finding that bankrupt was insolvent at time of transfer of his accounts.
3. BANKRUPTCY ⟹467—APPEAL—FINDINGS BY REFEREE AND COURT—REVIEW.
   Nothing less than a demonstration of plain mistake warrants overturning of finding by referee, concurred in by court on review, of insolvency of bankrupt at time of transfer of his accounts, made on evidence taken in presence of referee, and in some particulars vague, indefinite, uncertain, and conflicting, and involving questions of credibility.

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

In the matter of the bankruptcy of Gottleib & Co. The order of the referee in proceedings by Edwin R. Semple, trustee, adjudging void transfer of bankrupt's accounts to Adolph M. Rosenberg, was affirmed on review by the District Court (245 Fed. 139), and Rosenberg appeals. Affirmed.

Edwin G. Adams, of Newark, N. J., for appellant.

Samuel I. Kessler, of Newark, N. J., for appellee.

Before WOOLLEY, Circuit Judge, and HAIGHT and MORRIS, District Judges.

MORRIS, District Judge. Gottleib & Co., a corporation, transferred certain of its book accounts on December 7, 1915, to one Rosenberg, a creditor. An involuntary petition in bankruptcy, resulting in adjudication, was filed against it on February 2, 1916. Upon proceedings prosecuted by the trustee the referee in bankruptcy found that the transfer to Rosenberg was void under section 60b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. § 9644]). The order of the referee thereon was upon review affirmed by the District Court. 245 Fed. 139. From the order of affirmance, Rosenberg appeals.

The assignments of error allege that the evidence does not establish insolvency of the bankrupt at the time of the transfer. There is no assignment alleging error in the admission or rejection of evidence.

The company issued its capital stock to the amount of $15,000 to three persons; each receiving stock of the par value of $5,000. While it does not expressly appear what amount two of these stock-

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

holders paid for their stock, it does appear that one of them paid only $500 therefor. The company began business with its capital thus impaired, and so continued until May, 1915, when an involuntary petition in bankruptcy (not the present one) was filed against it. In July, 1915, before adjudication, a composition was effected with its creditors by giving notes, payable in equal installments at the end of 6, 12, 18, and 24 months, for the full amount of their respective claims, and paying the fees and expenses of the bankruptcy proceeding, amounting to about $4,000. Business was thereupon resumed, but all merchandise had to be obtained through Rosenberg, or on his credit. No one else would extend credit to the company. The company made no profit.

The first installment of the composition notes fell due on December 1, 1915, and only about one-half of the amount due thereon could be paid. An accountant testified that on December 1, 1915, the assets of the company amounted to $38,635.93, and its liabilities to $53,679.34; that the statement showing this result was made up from the books of the company, with the exception of the items of physical assets and the value thereof; that these were taken from the inventory and appraisement filed in the bankruptcy proceeding, and worked back to December 1, 1915. The president of the company testified that of the physical assets the machinery and merchandise were, on December 1, 1915, substantially the same in quantity and value as shown by the inventory and appraisement; that the value of the remaining item of physical assets, namely, real estate, was several thousand dollars less than shown by the appraisement; that the liabilities were increased very little, if any, after December 1; that there was no material change either in the assets or liabilities, between December 1 and 7, 1915; and that the market value of the machinery on December 1 was much lower than when it was purchased. The report of the trustee admitted in evidence showed that only $20,900 was realized from a sale of all of the assets of the bankrupt. The claims filed against the bankrupt estate amounted to approximately $59,000.

[1] The Bankruptcy Act provides that a person shall be deemed insolvent—

"whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Comp. St. § 9585.

But direct and detailed evidence of the facts constituting insolvency is not essential. Owing to its nature, insolvency is not always susceptible of direct proof. It may, and in many cases must, be proved by the proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred. Ridge Ave. Bank v. Studheim (C. C. A. 3d) 145 Fed. 798, 76 C. C. A. 362; Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284; Fowler v. Crouse, 175 Fed. 646, 648, 99 C. C. A. 200; Healy v. Wehrung, 229 Fed. 686, 144 C. C. A. 96; Grandison v. Robertson, 231 Fed. 785, 145 C. C. A. 605; Grandison v. National Bank of Commerce, 231 Fed. 800, 806, 145 C. C. A. 620.

[2, 3] Notwithstanding the contrary has been urged with much

cogency by the attorney for the appellant, we think the evidence in this case, as in those just cited, warrants a finding that the bankrupt was insolvent at the time of the transfer of the accounts to Rosenberg. Moreover the evidence was in some particulars vague, indefinite, uncertain, and conflicting, and involved questions of credibility. It was taken in the presence of the referee, who expressly found that the bankrupt was insolvent at the time of the transfer. The District Court likewise so found. It is well settled that:

"Under such circumstances this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake." Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184; Deupree v. Watson, 216 Fed. 483, 132 C. C. A. 543.

Such a mistake has not been demonstrated.

The order of the District Court is affirmed.

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257 Fed. 74)

FIRESTONE TIRE & RUBBER CO. v. SEIBERLING.

(Circuit Court of Appeals, Sixth Circuit. December 13, 1918.)

No. 2954.

1. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—MACHINE FOR MAKING TIRE CASINGS.

The Seiberling and Stevens patent, No. 762,561, for a machine for making casings for automobile tires, claim 1, assuming its validity, is entitled to a limited construction only, and, as so construed, *held* not infringed. Claims 2 and 14 are invalid, as for an aggregation of parts having no operating connection with each other.

2. PATENTS ⟹177—INFRINGEMENT—CONSTRUCTION OF CLAIMS.

A part which is clearly made an essential element of a combination claim by the patentee must be given effect as a limitation, although in actual use of the machine it proved unimportant.

3. PATENTS ⟹328—VALIDITY—MACHINE FOR MAKING TIRE CASINGS.

The State patent, No. 941,962, for a machine for making casings for automobile tires, is invalid for anticipation of some of the claims, while others are for aggregations, and not true combinations, and the patentee was not the inventor of the method used.

4. WORDS AND PHRASES—"SPINNING."

The art of shaping a flexible sheet of metal down over irregular forms or dies, circular in cross-section, is very old, and is known as "spinning." It is done by clamping the metal sheet upon the form, revolving both together rapidly upon the axis of the circular cross-section, and then with a tool pressing the metal down against the form.

Appeal from the District Court of the United States for the Eastern District of the Northern District of Ohio; John M. Killits, Judge.

Suit in equity by Frank A. Seiberling against the Firestone Tire & Rubber Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 234 Fed. 370.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Edward Rector, of Chicago, Ill., and Frederick P. Fish, of Boston, Mass., for appellant.

Wm. L. Day, of Cleveland, Ohio, and Robert F. Rogers, of New York City, for appellee.

Walter F. Rogers, of Washington, D. C., amicus curiæ.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Seiberling brought the usual infringement suit against the appellant, based upon two patents, each relating to the manufacture of casings for automobile tires. The first was issued to Seiberling and Stevens on June 14, 1904, and was No. 762,561; the second was issued to Seiberling on November 30, 1909, No. 941,962, upon an application made by State. The court below held valid and infringed claims 1, 2, and 14 of the earlier patent, and 16 claims of the later patent. The defendant had denied that there was either validity or infringement. After the case had been argued in this court, a Belgian patent (Mathern, of September 20, 1906) said to show anticipation of State as to some features involved, was discovered; and, upon an application to remand the case for further proofs, a stipulation was finally made and approved by the court by which this patent and explanatory affidavits were incorporated into the record. The case was then again argued. The record and proofs are unusually voluminous, but, in view of the conclusions which we reach, a relatively brief statement will be sufficient.

A tire casing of the class now involved is composed of successive layers of fabric, cemented together by a suitable composition and shaped into the form of a tube, which is open on one side so that it is horseshoelike in cross-section, and the ends of which are joined together to make it circular and endless. The tube opening or slot is along the inside; and a solid rubber body is added along the outer circumference or periphery to constitute the tread portion of the finished casing. The general process of manufacture by hand, much older than the Seiberling and Stevens patent, was this:

An annular metallic core having spokes and a hub was centrally mounted upon a shaft so that it could revolve, the core thus resembling the rim or tire of a wheel. This core was approximately circular in cross-section, and its cross-section diameter as well as its entire diameter through the hub from edge to edge of the rim were proportioned according to the size of the casing to be made. The operator coated this core with an adhesive substance. He then took a strip of rubber-impregnated fabric which would stretch out to be as long as the circumference of the core, and in width somewhat less than the circumference of the cross-section. As he revolved the core on its hub, he stretched and pasted this fabric strip upon the core, pressing and shaping it with his fingers or with hand tools so that it adhered in all places and was without wrinkles. He repeated this operation as many times as there were to be fabric layers in the casing. The impregnating composition, having the character of rubber, would also attach each

two layers of the fabric together. The strip of fabric was cut upon the bias, and the warp threads therefore ran from the inner open edge of the tube in a diagonal course along, across and around the tube to the other open edge thereof; and the next layer of fabric put on was reversed so that these warp threads crossed those of the first layer at a selected angle. Where the ends of the fabric met each other, they were overlapped enough to make a pasted joint. Each layer of fabric was first pressed down and attached by the hand of the operator on its central portion throughout its length, thus constituting the part of the casing corresponding to the tread. The degree of lateral curvature here is slight, and there would be no difficulty in making a smooth attachment, but as it was continued around the remaining circumference of the cross-section, there would be an obvious tendency to gather and wrinkle. This wrinkling would be fatal to the strength of the casing, and it could be avoided only by careful manipulation and gradual shaping. The ultimately smooth and unwrinkled surface could be had by virtue of a quality which all woven material has had since weaving was known; i. e., that it will contract in one direction as it stretches in another. When a fabric is stretched in one diagonal direction, its square meshes become diamond-shaped, with the length of the diamond along the line of stretch and its width at right angles. This produces a contraction of the fabric in the line of its width. In tire building, it is primarily the central part of the strip which is thus stretched longitudinally as it is attached to the tread of the core, leaving the side portions or wings projecting and free. Upon the same principle, if these side portions are then stretched laterally, they will shrink longitudinally, and, if this stretching is done in progressive measure as the edges are approached, the longitudinal shrinking will be greatest at the edge. In this way, it results that the fabric may be shaped smoothly and without wrinkles to the entire side core surface.

[1] The Seiberling and Stevens patent seems to disclose a machine for doing this work automatically, instead of manually. The machine comprised (so far as now necessary to mention): First, a main power driven shaft which would indirectly engage and drive the core and with such selective connections that the core could be revolved at low speed or at high speed, or entirely released, as desired; second, a reel carrying the rubber-impregnated fabric strip; third, a tension roller retarding the reel, and thus causing the central tread strip of the fabric to be given a continuing stretch after the free end is attached to the core; fourth, a pressure roller or cylinder concaved on its exterior to match the shape of the tread of the core, whereby the tread portion of the strip was pressed upon and attached to the core as the latter revolved; fifth, an arm carrying, at its end, a laterally spring-pressed finger—"the jigger finger," and which arm was intended to be reciprocated rapidly, radially of the core, in such a way that the finger traveled in and out radially, pressing against the side of the core as the latter revolved, and which pressure finger therefore traveled a saw-tooth course between the edge of the stretched, central, tread portion of the fabric and its final outer edge, and corresponded in function to the

human finger pressing the fabric down against the core and stretching it into shape; sixth, a further arm containing a further pressure wheel to be applied along the edge of the attached fabric, after it was attached, to press it into a crease, constituting "stitching." The described operation is consistent with the idea that the side pressure-attaching finger would follow immediatly the tread pressure roller, so that with one revolution of the core the machine would attach the fabric, press down the tread and press in the sides, and so that all of these devices would be in operation at the same time on the same strip. After one complete revolution, the core was stopped and the fabric cut away from the reel strip. If the one revolution had not been sufficient, then, after the fabric was cut away and the loose end pasted down, as many more turns could be had as necessary—apparently with all the attaching means at work together—if desired. Based upon the disclosure thus generally described, the patentees claimed:

1. "The combination in a machine of the class specified of a tension device to simultaneously smooth and flatten strips of fabric, a revoluble core to receive said strips from said device, means to form said strips approximately longitudinally about said core and means to regulate the tension on said feeding device."

2. "A machine of the class specified consisting of revoluble means to support the article to be built while in the process of manufacture and means for creasing or stitching portions of said article on said revoluble means."

14. (The fourteenth claim does not differ from the second in any respect now material.)

The second and fourteenth claims must be held invalid for the same reasons pointed out with regard to claim 4 of the State patent, later discussed. The creasing rollers are hung on a swinging arm which happens to be attached to the frame of the machine. It might as well be fastened to the ceiling of the room. The pressure applied to the creasing rollers, which forces the fabric into the creases, is the pressure of the operator's hand. They are not at any time or to any extent operated by the mechanism which operates the other parts of the machine. They are "only used at intervals." There is no combination between these creasing rollers with their supporting arm and the other parts named in the claim. Their mutual relation is precisely that of the writing lead and the erasing rubber in the rubber-tipped pencil, where the only connecting link is the carrier. Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719. It may further be observed that claim 2 is not limited to a machine handling flat strips of fabric, unless by the phrase "in a machine of the class specified." This phrase, as found in other claims (e. g., 3) shows no intent to effect such limitation. If the claim covers devices which receive and treat strips of fabric prewoven to form—as it seems to—it is anticipated by Johnston, Jeffrey or Moore.

We do not thus dispose of claim 1. We are not prepared to say that it is anticipated or that there is no combination between its elements when they are treated as the specification indicates. The tread-pressure roller automatically effects the revolution of the core. With it, the reel and the tension device may be in simultaneous operation. The side pressure fingers are reciprocated by tripping in a connection with

the main driving mechanism, and may be operated simultaneously with the other just named parts—at least, for part of their work. It is not necessarily fatal to the theory of combination that continuing the work of the pressure fingers may be necessary after the tension device has exhausted its function. Without intending to pass upon all the questions involved, we prefer to assume the validity of this claim and look to see if there is infringement.

The defendant's device is particularly described hereafter. It is enough now to say that it has no tread-forming roller which operates simultaneously with and in advance of the side-forming means, and that it has discarded the jigger finger, operated by the driving power of the machine, and has substituted side-pressing means of different form and operation.

[2] Whether defendant's instrumentalities are equivalent to those of the Seiberling and Stevens patent, under any scope which the state of the art permits to the phrase "means to form said strips longitudinally along said core," is a question which we find unnecessary to decide. Another reason sufficiently requires the conclusion that claim 1 is not infringed. Out of the four elements named in the claim, the first is "a tension device," which feeds fabric strips to the core, and the fourth is "means to regulate the tension of said feeding device." In a certain sense, every tension device is, in itself, a means for regulating, and it is not impossible that, under some conditions, a tension device by itself might be held sufficiently responsive to the descriptive words of both the first and the fourth elements; but this claim must be construed to require the independent existence of the fourth element. This is the apparent force of the face of the claim. The specification carefully describes regulating means by which the tension resistance can be instantly varied at the pleasure of the operator, by turning an adjusting screw. The present first claim is a substitute for the first three claims as filed. At the time of filing, claims 1 and 3 contained no reference either to tension device or regulating means, while claim 2 did not mention a tension device separately from its included "means to adjust the tension on the feeding means." After a rejection, claim 3 was amended by inserting a reference to the tension device itself. After a further rejection, the three claims were canceled and the present one substituted. It was then allowed. The applicant had presented one claim referring independently to the tension device and one claim referring independently to the means for adjusting the tension. With this in his mind, he withdrew them and presented and secured a claim calling for each of these elements as separately existing. The intent to regard the ability to modify the tension device as an essential part of the invention which was being patented, could not well be clearer. It seems now to have developed that this adjustability is not very important, in the commercial use of the machine; but these patentees then might well have believed that it was vital to an operative machine. They had in their minds a friction tension, and they saw that the amount of stretch to be given to the fabric by it would depend upon the length of the fabric strip under stretch, the width of the strip, the strength and other inherent qualities of the fabric, the extent and moisture

contents of the rubber impregnation and very likely the temperature and humidity of the air in the factory. All these conditions might change from hour to hour. Hence the independent and separate call for regulating means cannot be considered a mere inadvertence, the limiting effect of which a court would be inclined to escape, if possible. Although it may be voluntary and unnecessary, it must be given effect. McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; Arnold-Creager Co. v. Barkwill Co. (C. C. A. 6) 246 Fed. 441, 444, 158 C. C. A. 505.

Defendant uses a different tension device. There is no efficient frictional resistance to the travel of the fabric to the machine, but the resistance is caused by a positive gear connection. The periphery of the fabric feed roller is compelled to travel at a speed proportionate to the peripheral speed of the core, and at a fixed percentage less. This percentage is determined when the machine is built, by providing, for the feed roller and for an intermediate roller peripherally driven by the core, intermeshing gears of the same number of teeth, and by making the feed roller of smaller diameter than the intermediate roller. After the amount of stretch is thus determined and fixed—at, say, 14 per cent.—it can never be varied, unless by an expedient which plaintiff suggests and upon which theory alone he seems finally to rely to make out infringement of this claim. It is said that, by substituting upon the feed roller another gear with a greater or less number of teeth the speed of the feed roller can be increased or diminished. This is true; and it may well be that if the defendant's machine were built in contemplation of such a change, and if an assortment of gears were provided with it therefor, it should be thought to contain "means to regulate the tension"; but there is nothing to indicate that the machine was built with any such purpose, or that the defendant has any means of thus regulating the tension, or ever has done so or desired to do so. In this situation, it seems an apt suggestion by defendant's counsel that we might as well say an ordinary table contains "means for regulating" its height, because we can take off the legs and put on some longer ones.

The theory that the constant stretch insured by defendant's mechanism constitutes both a tension device and a means for regulating it is urged by plaintiff's counsel, when they say that "to regulate" means "to maintain." To adopt this theory is to say that the phrase "means to regulate," etc., adds nothing to the claim. We cannot conceive any tension device which is not, in itself, "means to maintain" a fixed tension. Further, the theory would be, obviously, untenable, unless the patent were entitled to the most extreme liberality because it produced very great practical commercial results. It cannot have such a degree of credit. If the machine in the patented form had proved successful, and had gone into extensive or even considerable use, it might be regarded in this light, even though it had not been generally accepted until aided by later patented improvements. This did not happen. One machine was built, but there is evidence that no tires were successfully made upon it, and that the jigger fingers would not smooth the sides so as to make first-class tires. Certainly, its attempted

use by the Goodyear Company was abandoned, the machine discarded, and no other ever built.

We further find that upon the application for the State patent Mr. Seiberling, familiar with everything which had been done on the Seiberling and Stevens machine, made an affidavit that State's machine "was the first to successfully make such tires on a commercial scale by machinery." This affidavit does not work any estoppel, but there is every reason why we should accept it as true in its necessarily implied reference to the Seiberling and Stevens machine, and decline to give that patent the breadth of construction, beyond its letter, which is appropriate only for a great practical success.

Whether defendant employs any tension device "to simultaneously smooth and flatten strips of fabric," interposing, as it does, nothing between the feed roll and the means which throw the fabric out of flat, may be passed without consideration. For the reasons stated, it must be held that there is no infringement of claim 1.

[3] The Seiberling and Stevens patent belonged to, or was practically under the control of, the Goodyear Company, one of the largest manufacturers of tires, and of which Mr. Seiberling was general manager. State was in the employment of the same company. After about five years, State filed his application for the second patent in suit. His machine was developed and his patent application prosecuted under the supervision of Mr. Seiberling. State's machine was of the same general type as Seiberling and Stevens. His most substantial change or improvement was that he discarded the reciprocal in-and-out forming finger of Seiberling and Stevens and substituted a tool which he rightly calls a spinning roll. He provides, in the same general way, a core and a fabric reel and a retarding device, whereby he gets his strip of fabric attached to the core for the width of the tread portion, leaving the remaining wing portions projecting outwardly. Attached to the base of the frame which carried the revolving core was a standard, manually adjustable horizontally to and from the core; that is to say, it traveled in a horizontal track, which track was an integral part of the frame. At the upper end of this standard was a revolving head or table, called by State a turret, and so plainly the turret of the common turret lathe that his choice of name was most natural. Mounted at four equidistant points on the edge of this table are four tools, independent of each other, except for their common base. The first carries the tread roller, the second the spinning rolls, the third the stitching rolls, and the fourth the bead attaching rolls. The turret standard was fixed in the plane of the revolving core, beyond the periphery thereof, and State revolved his turret until the tread roller was in the same plane, with its axis at right angles thereto. He then moved the standard and turret forward so that the tread roller bore against the tread on the core, with such pressure as the operator chose to give it. When the tread was sufficiently smoothed down and attached, he moved the standard back, gave the turret a one-fourth revolution, bringing the spinning roll device to bear and moved that forward in the plane of the core until the operation of spinning down the side was complete. He then withdrew the standard, gave the turret

another one-fourth revolution, and, in the same way, moved it forward again and used his creasing or stitching roll, if necessary. Then, again, by a similar operation, he brought into effect the fourth device on his turret, which was a bead-forming, or trimming roll, to be used in certain cases only. In each instance, the time during which and the pressure with which the tool was to be applied (except for certain spring pressure) was regulated by the operator's hand. In no instance did the machine do anything except to keep the core revolving. The fact that the tools were mounted on a revolving table, which table was mounted on the frame of the machine, cannot be important. From the standpoint of an interdependent combination, the situation is the same as if these four tools had been lying upon a work bench by the side of the operator and he had successively selected the ones he desired. While this is obvious, it is emphasized by the fact, clearly appearing, that operators using the State machine often discard the spinning tool mounted on the turret, and, after the tread is formed, spin the sides down by hand.

In the form of spinning tool shown in the patent, there are two rolls pressed toward each other by springs and operating upon both sides of the tire at the same time. There is, thus, an automatic feature to the pressure with which the spinning rolls are applied; but this does not show the existence of any combination with the remainder of the machine. A hand tool with two oppositely spring-pressed rolls would work in the same way if it were hung from any support, or held only by the workman; and there is no relation of dependency between the automatic action of the springs and the automatic action of the revolving core. They both affect the material at the same time, and that is the most that can be said. The fabric reel and the tension device have finished their function when the first revolution is completed and when the strip of fabric has passed once around the core and has been cut and the pasted-on joint made. They have no further office in the building of the tire than if they did not exist. The tread-forming roller then is brought into play and finishes its function and drops out of action. Then, and only then, the operator brings the spinning roll to bear. It performs its work precisely as it would if the fabric strip had been stretched and attached wholly by hand; and the sides of the tire, the tread of which has been formed by the aid of the machine, may be spun down and attached by hand operation just as they are by State's device. We do not intend to deny that a true combination may sometimes be found where the same underlying mechanism operates all parts of the machine and where different elements separately act in successive steps upon the raw material as it is being transformed into the ultimate product (though the latest decision of the Supreme Court, Grinnell Co. v. Johnson Co., 247 U. S 426, 38 Sup. Ct. 547, 62 L. Ed. 1196, perhaps tends to the contrary); but the trouble here is more vital. State's spinning tool has no operating connection whatever with the remainder of the mechanism. Each part performs its own work in its own way, and no new result flows from bringing the two into juxtaposition. We may find further illustration in the familiar turning lathe. If the cutting tool is carried in a holder which

automatically travels along a line parallel to the axis of the revolving chucks which hold the material being shaped, we can see the combination between the chucks and the cutting tool; but not so, if the tool holder is moved along its path by the operator's hand—even though the path be upon a fixed guide.

In Gas Co. v. United Co., 228 Fed. 684, 143 C. C. A. 206, we considered the distinctions between aggregation and combination. Applying to the present case the principles there developed and the authorities there cited, we are satisfied that there is no true combination between State's revolving core and his independent spinning tool, or bebetween such core and his independent tread-forming roller, or between such roller and such spinning tool. The Grinnell Case, supra, may involve the difference between that putting of old elements into a coacting relationship which is invention as distinguished from a similar putting together which is merely skill, rather than involve the distinction between elements which form a composite as distinguished from an aggregate; but, however that may be, that decision fortifies the result which we reach here. It is not easy to see any difference in principle between a device which first washes a garment, and then, by separate mechanism, dries it, and a device which first shapes and attaches the tread of the tire, and then, by separate mechanism, attaches the sides.

This conclusion invalidates, because of mere aggregation, claim 4[1] and all the other claims of the State patent sued upon (except the fifteenth, seventeenth, and perhaps the eleventh). We might safely rest our decision thereon; but plaintiff really presents his case on the theory that State discovered a new method of making tire casings or a new set of functions to be performed by associated mechanism. Although a mechanical patent may not be granted for a function (Westinghouse v. Boyden Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136), yet it is now settled that a method patent may be granted for an association of successive mechanical steps (Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034), and to hold a mechanical patent void for aggregation, when the same monopoly sought by the patent might have been obtained through a method patent, seems somewhat artificial; hence, we prefer to point out also that State had nothing broadly new either in his method or in his selected tools; and that so far as some details may be new, they are not used by defendant.

[4] The art of shaping a flexible sheet of metal down over irregular forms or dies, circular in cross-section, was very old and was known as "spinning." This was done by clamping the metal sheet upon the form, revolving both together rapidly upon the axis of the circular cross-section, and then with a tool—which might be a narrow or sharp-edged roller or disc held in a yoked handle—pressing the metal

[1] Claim 4. An open tire shoe making machine, comprising the combination of a sheet fabric supply, a power driven ring core, a radially moving support laterally spring-pressed toward the core, and a spinning roll mounted on the support, for passing radially along the sides of the tire shoe, to shape the sheeted fabric on the core, substantially as described.

down against the form. The spinning disc, being held in a plane substantially tangential to the circumference of the form at the point of contact, would itself be caused to revolve; and, if it were slightly inclined inwardly from this tangential plane, it would gradually move down along the side of the form and its path thereon and upon the metal would be helical. The successive coils of this travel might be so close together that they practically touched each other, and so the whole surface of the sheet and of the form would be covered by this travel and the sheet would be stretched and shaped to the form. If State had been the first to observe that this spinning process could be applied to shape a tire upon its core as well as to shape a bottle cap upon its core, the question of whether there was invention in the transfer would have required consideration; but he was not. The evidence that this identical spinning operation was performed upon tire casings by hand tools before State's invention is sufficiently satisfying to meet all the requirements of the situation.

One witness testified that this spinning operation with a hand tool was common practice for smoothing down the sides of tires at a date three years earlier than the building of the first State machine; one told of the same practice in use at Detroit the same year State was constructing at Akron; and one seems to refer to it as a common practice in the Goodyear shop in 1903. Considered critically, all this testimony might not be sufficiently definite and positive to prevail by itself against circumstances tending to throw doubt upon it; but there are no such circumstances. When defendant's proofs closed, this proposition would ordinarily be taken as fairly established; Messrs. State and Seiberling were called as witnesses on the rebuttal; both were familiar with the history of the art; neither one denied or questioned this proposition; nor did any other witness for plaintiff. More than this, State, in his specification, speaks of this spinning operation as if it were well-known hand practice, and seems to rely upon the advantages of his tool over the existing hand method. This is not all: The Seiberling and Stevens patent shows what it calls creasing or stitching rollers. Each one is undoubtedly an effective spinning tool and capable of use as such; their edges, as shown, may be sharp enough to cause some danger of cutting the fabric, but the spinning would be done by the side bevels, not by the extreme edge; and plaintiff's theory that defendant's spinning roll is so far the equivalent of the Seiberling and Stevens stitching rolls as to make out infringement of the claim based thereon goes far to persuade that they are, in a broad sense, an anticipation of State's spinning roll. There seems no sufficient reason to doubt that Stevens used them for spinning in 1903 or 1904. The Moore patent shows what is, essentially, a spinning roll for operating against a revolving core in making a tire casing. It was intended to and did smooth down the Moore tire from the center of the tread only part way, and not much further than may be done by the typical tread-forming roll; but the operation is substantially spinning, as far as it goes, and involves, in some degree, the characteristic relocation of the threads of the fabric, even though it may only put them back where they were before the casing was distorted by placing it on the core. In

the Moore patent, the handle of the spinning roll was so attached to its frame that the roller could not effectively travel radially of its core down as far as the bead, but if its attaching staple is made larger, the whole tire can be formed thereby, as demonstrated. Further, there is no reason to doubt that State and Seiberling were familiar with the character of patent protection, and were advised by competent counsel. If they had thought that State was the first to shape the sides of the tire by the spinning operation, it is highly improbable that he would have omitted to apply for a method patent. Still further, it is conceded that the Belgian patent is a complete anticipation of State as to the matter of employing a radially-moving spinning roll in this type of tire-making machine for shaping the side of the tire, unless plaintiff is right in his contention that in the Belgian patent the fabric was first partially attached to the side by a device resembling Seiberling and Stevens' jigger fingers, that this operation left wrinkles and puckers, and that the spinning roll was used only to remove these wrinkles and perfect the attachment. We do not see that this alleged distinction is very important. No matter if the fabric has been already partially attached—as much as is consistent with any reasonable theory of operation—the tool of the Belgian patent is a spinning roll, and performs a spinning operation; and, if we are right in what we subsequently say regarding the "centrifugal force" theory, the Belgian tool in its radial progress was bound to stretch and reshape the fabric in substantially the same way that is done by State. Putting all these things together, State cannot be considered as the inventor of the method; and hence there is no reason to hesitate at the result which was reached because of aggregation.

One group of State's claims is distinguished by the call for shifting the revolution of the core from a slow speed while the fabric strip is being put on to a high speed while the spinning is to be done. Seiberling and Stevens did the same thing, so far as concerns any broad idea, and the particular devices by which alone State distinguishes this part of his action from Seiberling and Stevens are not employed by defendant.

Another group of claims is characterized by the requirement that the spinning roller should be set in a plane at "a receding angle" to the plane of the core. It is not clear that this thought imparts any novelty to the claims. The same angle is shown by the Seiberling and Stevens stitching rollers, and it was certainly open to the user of any hand tool to apply it in this specified plane. However, the defendant does not do this; the claim of infringement in this is based upon a confusion of thought. If we picture the spinning roller as a disc—whereby its plane is more sharply conceived—and if we assume that the core is vertical and its axis horizontal, and that the disc is to be applied to the core midway from top to bottom, we observe that the plane of the core and the vertical plane of the axis are at right angles to each other, and that the relationship of the plane of the spinning roll to the plane of the core, and its relationship to the plane of the axis, are independent of each other. The plane of the spinning roll may be at right angles to the plane of the core and at the same time at any selected angle to

the plane of the axis. So far as concerns the first relationship above stated, defendant's spinning roll is normally set with its axis horizontal and parallel with the core plane, and therefore operates in a plane at right angles to the plane of the core; but it is capable of adjustment to, and is intended sometimes to operate in, a plane not at a receding angle to the plane of the core, but at an angle which, as compared with that shown by State, is more than ninety degrees—an advancing angle. In other words, its carrying yoke, normally at a right angle to the core plane, may be swung slightly on its pivot toward the outside of the core. The only purpose and utility indicated by State for his receding angle are that the disc may not become entangled with the out-flying skirts of the fabric, and the angles adopted by defendant, for normal use or for special setting, tend to produce the very result shunned by State. In the machines used by defendant the spinning roll may be manually placed at the "receding angle," but in operation it will not stay there, but returns at once to the right angle position. Defendant did at one time make some use of a machine embodying this "receding angle," but it was not practically more than experimental and has been abandoned, and was too negligible to justify any judicial action based thereon. The defendant does set its disc at an angle, which may be called "receding," to the vertical plane of the core axis; the disc axis (in the form assumed) ceases to be horizontal, being shifted perhaps ten degrees; but this is a different matter. This setting is for a purpose different, and causes a result different from anything found in State. It brings a constant radial slip or wipe of the roller upon the fabric, and directly causes a radial stretch. The claims of this group are not infringed.

If the "forming roll" of claim 11 is the spinning roll, the claim is invalid for aggregation; if this "forming roll" is the tread roller, then the claim is anticipated by the Seiberling and Stevens machine.

Claim 15 suggests nothing new over Seiberling and Stevens, excepting a yieldingly mounted take-up roll for receiving a layer of muslin, or thin cloth, which is upon one face of the rubber-impregnated fabric as it is rolled upon the supply reel. Precisely the same take-up roll is shown in older machines for feeding similar rubber-impregnated fabric to make rubber belting. It cannot be important that the fabric in this case is received by a revolving core, rather than by the receiving mechanism of the old machines. The take-up roll does its old work in its old position and for its old purpose. Its transfer from the old machines to Seiberling and Stevens discloses no inventive novelty. Claim 17 also reads upon Seiberling and Stevens, save for the addition of "a stretching roller between the tension device and ring core whereby the longitudinal creases are taken out of the fabric and it is smoothly and evenly supplied to the ring core." This also discloses the adoption of a device in common use for the same purpose in analogous situations; but its declared purpose and effect are to avoid the very operation which defendant employs. This stretching roller is for the purpose of delivering the fabric to and upon the ring core in a smooth and flat state. Defendant interposes a convex shoe which delivers the fabric strip to the core in a curved or U-shape. The

curved shoe or form which gets the latter result could not be considered the equivalent of the flat rollers which get the former without a much greater degree of liberality than is—at the best—permitted by the state of the art.

Claim 14 is not sufficiently typical to justify using it as the criterion of infringement, as plaintiff would have us do; but, if it were, it shows still another reason why plaintiff must fail. It calls for a stock roll, a ring core, "a radially and transversely movable support, a tread forming roll and a laterally yielding spinning roll for passing radially over the sides of the tire shoe mounted thereon," etc. The tire shoe is not mounted on the spinning roll; the clause "for passing * * * tire shoe" is parenthetically descriptive, and the claim must be considered as specifying a radially and transversely movable support having mounted thereon a tread roll and a spinning roll. Defendant has no one support carrying these two rolls, but has two independent supports. One is movable radially, neither transversely. The claim plainly refers to the revolving turret, when it says "support," and defendant has nothing equivalent.

The argument for plaintiff takes the Seiberling and Stevens invention of 1903 and the State improvements of 1908 and puts them together as constituting one pioneer patent dated in 1903; or, stated in another way, it takes the large public acceptance and use of the State patent and thereby attributes merit to the Seiberling and Stevens patent, overlooking the undoubted fact that the first reasonably successful commercial machine was that of Vincent, who intervened between the two. It goes without saying, that the Seiberling and Stevens patent is just as effective in denying to State the position of pioneer as if it had not happened that both have been controlled by the same interests.

We are told that the centrifugal force disclosed by State's operation caused the unattached skirts of the fabric to fly out at right angles to the plane of the core, and that the effect of the spinning tool slowly advancing against this skirt was to produce a "hinging and folding action" which was novel and important. We are not impressed by this claim. These words do not seem very appropriately descriptive, but the action which takes place not only pertains to a method or process rather than to any particular mechanism, but it was more or less inherent in the rapid revolution of the core effected by older means, and in the use of any spinning, stitching or creasing rollers. It is not the "hinging and folding" but the radial stretching, and the resulting circumferential contraction, that bring about the desired smoothness. It is possible that in State's particular form of device, with his spinning disc at its "receding angle," and practically tangential to the core circumference at the point of contact, there will be enough "hinging and folding" back over his tool to produce a friction which would cause more stretch than could the mere rolling advance of the disc in its helical path; but if there is an appreciable effect of this kind, defendant does not have it. Defendant gets its stretch from the slip or wipe which is compelled by the fact that the spinning disc cannot roll unobstructedly in its own plane—which fact results from its inclination

toward the plane of the core axis. This very inclination puts part of the disc out beyond the supposed line of "hinging and folding," and prevents a fold at the point of contact. Centrifugal force is not mentioned, in State's specification, save as creating an obstacle to be avoided. Perfectly successful spinning performed in court, upon a slowly revolving core, demonstrates that the outflying skirts are not essential. To make centrifugal force an effective basis of validity in the State's patent would be to give a monopoly of the spinning process or of rapid core rotation; and each was old.

We are also told, and upon this plaintiff seems to place great reliance, that Seiberling and Stevens or State—we are not sure which, but apparently by some kind of joint action—discovered and accomplished for the first time such a distortion of the fabric meshes as gave great strength to the built-up casing. This result plaintiff's counsel denominates "the rearrangement of the reticulations" and "placing the threads in geodetic lines." There was nothing new about this. On the contrary, it had been present in every smooth fabric tire casing that had ever been made by anybody. As we pointed out in the early part of this opinion, it is inherent in shaping a fabric to an irregular surface. It consists in the fact that when the rectangular mesh is expanded on one diagonal axis it will contract upon the other. Outside of tire casings themselves, a familiar instance is the shaping of canvas to cover the hull of a canoe. Still more familiar is the handkerchief or the collar, unevenly ironed. This discovery by plaintiff or his counsel was in the realm of nomenclature, not of mechanics.

The decree must be reversed, and the record remanded, with instructions to dismiss the bill.

(257 Fed. 87)

TAGGART BAKING CO. v. GREEN et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919. Rehearing Denied March 4, 1919.)

No. 2520.

1. PATENTS ⟹102—APPLICATION—VERIFICATION OF CLAIMS.
   Claims 40 and 41 of the Green patent, No. 1,180,030, inserted after the original application on request of the examiner for the purpose of interference, were within the drawings and specifications of the original application, so that no additional verification thereto was necessary.

2. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—BISCUIT CUTTER.
   The Green patent, No. 1,180,030, claims 29, 30, 40–45, inclusive, for a biscuit cutter, especially relating to pan carrier with automatic skip, which could be adjusted without stopping the machine, *held* valid, as disclosing invention and infringed.

Appeal from the District Court of the United States for the District of Indiana.

Suit by Thomas L. Green and another against the Taggart Baking Company for infringement of patent. Decree for complainants, and defendant appeals. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

James Love Hopkins, of St. Louis, Mo., for appellant.

Laurence A. Janney and Osgood H. Dowell, both of Chicago, Ill., for appellees.

Before BAKER, MACK, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. The patent in suit deals with a complicated biscuit cutting machine, claims 29, 30, 40–45, inclusive, being involved. The defenses to all claims are invalidity and noninfringement. An additional defense is made to claims 40 and 41, appellant contending that these claims were improperly allowed: (a) Because applicant's oath thereto is lacking; (b) because they are not supported by the specifications. These objections will be first considered.

[1] Green's application was filed February 20, 1909, but patent was not issued until April 18, 1916. During that time Allison and Pinkney filed application for patent (August 3, 1912) and letters patent were issued September 29, 1914, the subject-matter being a cracker-cutting machine. Its claims one and two are the same as claims 40 and 41. Originally, Green asked for the allowance of a claim numbered 56, covering generally the same matter as claims 40 and 41. Upon an interference being declared, Green was required to present his interfering claim or claims in the identical words of Allison and Pinkney. Patentee therefore inserted claims 40 and 41, corresponding to claims 1 and 2 of Allison and Pinkney. His statement in support thereof was duly sworn to, and the Patent Office ruling went to Green. Allison and Pinkney appealed to the Court of Appeals of the District of Columbia, and their appeal was later dismissed.

An examination of the drawings and the description as well as the proceedings in the Patent Office and other evidence convince us that a sufficient disclosure to support these claims 40 and 41 appeared in the original application, that no additional verification was necessary, and the interference proceeding was properly decided in Green's favor.

Since this appeal was argued our attention has been called to a decision of the United States District Court for the Eastern District of Tennessee in a case entitled J. H. Day Co. v. Mountain City Mills Co. et al., 257 Fed. 561. Complainant in that case was the manufacturer of the machine used by the Taggart Baking Company in the instant suit, while defendant was the user of the machine manufactured by appellee. The Allison and Pinkney patent, heretofore referred to, was under consideration and the judge in disposing of the suit said:

"Allison and Pinkney patent, No. 1,112,184. The proof was, in my opinion, beyond reasonable doubt that Allison and Pinkney were not the first and original inventors of the differential pan-skip mechanism disclosed in claims 1 and 2 of the Allison and Pinkney patent on improvements in cracker-cutting machine; that the first and original inventor thereof was Thomas L. Green, * * * who as early as 1909 invented this mechanism, constructed a machine, and successfully operated it at Cardiff, Wales. The result thus reached is in accordance with the action of the Patent Office in awarding the claims in suit of the Allison and Pinkney patent to Green in the interference proceeding," etc.

It also appears that, after the ruling of the Patent Office in the interference proceeding, Allison and Pinkney filed a disclaimer in the Patent Office, but limited in its scope. We therefore reject appellant's special attack upon these two claims.

[2] *Invention.*—Machines such as described in the patent are used in the manufacture of biscuits and crackers. Speed and avoidance of waste are their chief objects. In other words, bakers require a machine that will turn out as many biscuits as possible, all of any type being as nearly uniform as possible.

The patent citations contain many illustrations of machines designed to accomplish this result, some of which have been used with more or less success. Green attacked the problem by providing means to avoid stops and delays for adjustments.

The ordinary biscuit cutting machine requires a continuous sheet of dough, carried upon a driving apron under a reciprocating cutter which at every reciprocation cuts out a row of biscuits. As the apron advances, the scraps are dropped into a scrap carrier, and the biscuits are conveyed by the apron to a point called the delivery end of the apron, and there dropped or deposited into pans which are successively moved under the apron, each pan coming into place immediately upon its predecessor being filled.

It is with the operation of this pan carrier that the patent in suit primarily deals. The pan carrier advances each pan at a regular rate and receives the successively dropped rows of biscuits until the pan is full. A momentarily accelerated movement of the pan carrier then occurs so that the succeeding pan is brought into position to receive the succeeding row of biscuits. This acceleration of motion is termed by the witnesses, "skipping." It is highly important that the skipping should occur at the right moment; otherwise, there will be "crippled" biscuits, resulting in waste, etc.

Patentee well says that the capacity of a machine depends upon the speed and accuracy of accomplishing the panning operation.

> "For the biscuits must not pile up; they should be produced and delivered no faster than the pans can take them, and they should be panned properly to avoid cripples and wastes."

Green's machine employs a continuous pan feed, and counsel claims that it was the first high speed continuously operating machine capable of panning the entire product known to the art. Its asserted novel features are:

> (a) Continuous pan feed, with a positive gear transmission and an automatic skip means in the transmission.
>
> (b) Its automatic pan skip is provided with means for adjusting the skip relative to the pans without stopping the machine.
>
> (c) The use of speed change gears in the pan feed transmissions, so as to adjust the panning speed to the rate of production of variously sized biscuits.

If Green's machine lives up to the asserted claims of counsel, there is no question of invention involved, and we need only consider infringement, and whether the claims in the patent cover the novelty asserted, and no more.

Appellant, however, denies that Green is the first to produce a machine having an automatic pan skip with means for adjusting the skip relative to the pan without stopping the machine, and cites Appleton's Cyclopædia of Applied Mechanics, volume 1, pages 7–10, patent to Bleile, No. 863,349, patents to Carlson, No. 661,008 and No. 670,383, and to Ward, No. 865,461, and others.

While we may well take notice of actual disclosure appearing in Appleton's Cyclopædia of Applied Mechanics, published in 1899, the particular pages dealing with bread and biscuit machinery, we cannot agree with appellant in the conclusion that a machine anticipating Green's machine is disclosed. It is conceded that there were intermittent feed types of pan carriers with a ratchet and pawl drive in existence prior to 1909. There were also machines having continuous dough feed arrangements. There also may have been a machine in existence capable of pan skipping and employing an intermittent pan feed. But we conclude that the article referred to in the Cyclopædia referred to a continuous sheet of dough fed to the rollers, and not to a machine for a continuous pan feed.

The Bleile patent discloses a pan-skipping device for a biscuit machine, but it is clear to us that no machine is described, and patentee did not intend to describe a machine, wherein a readjustment of the position of the pans with the dough might occur while the pan carrier machinery was in motion. Bleile says in his specifications:

> "The face of the accelerating device is made the full width of the pulley face in order to insure the friction clutch between the parts, and the length of time this clutch shall continue can be very readily and easily adjusted by the set screws 27 to correspond with the space between the rear edge of one pan and the front edge of the next succeeding pan."

Of course, it is apparent that this set screw, when adjusted, may well have the effect of registering the skip with the pans; but it utterly fails to provide the means Green claims to have provided, namely, an automatic pan skip with means for adjusting the skip relative to the pans without stopping the machine. The set screw was not adjustable when the machine was in motion. We likewise think Green's claim that Bleile's machine did not possess any speed change gears is well taken.

Ward's machine does not possess a pan-skip mechanism, within the meaning of the word "skip" as here used, nor is the speed of the carrier relatively adjustable while the machine is in motion. Carlson's patent differs from the machine in question for the added reason that the pan feed transmission is not provided with speed change gears.

Appellant likewise confidently relies upon a machine known as the Cincinnati machine. Green charges that this machine is a fiction. The court heard the testimony and was in a better position than we to determine the weight to be given to the testimony bearing upon this machine. The sole witness who testified concerning it stated that it had been installed some 13 or 14 years previously, that it had remained complete for about a year, and that some parts had been taken off "because the witness had a man who did not know how to run and operate the machine. He got used to running the machine without

any pawls but one." After a lapse of many years, and shortly before this suit was tried, parts were put back or attached, and defendant's expert witness examined it, testifying on direct examination to its complete anticipation of Green's machine. There is certain testimony tending to show that this machine was not adapted to skipping, because of the absence of lugs on the carrier chains. Nor does the statement of the original operator coincide with the theory of the expert as to the purpose or use of a hand wheel by which the carrier was relatively adjusted forward or backward while in motion. While witness seemed to recognize the presence of a hand wheel such as was referred to by the expert, it is doubtful if it served or was capable of serving the purpose ascribed to it by the expert.

We cannot say upon this testimony the court erred in not recognizing this machine as an anticipation of the claims of the present patent.

Claim 29 probably best describes, element for element, the entire combination representing appellee's contribution to the art. We conclude the combination is supported by the description, involves novelty, and is valid. Claim 30 covers in the combination the continuous pan carrier, together with the specific pan-skipping mechanism and driving means. The other claims, 40–45, cover in combination the means for setting the pan carrier relatively forward or backward. Claim 44 was not included in the bill, but we see no error in including it in the decree.

While counsel attacks these claims individually, he fails to view each combination as an integer. Some of the patents relied on as an anticipation contain only single elements found in the combination. We find the combination contains elements which are new, and, as combinations, spell invention.

Infringement.—Little need be said on this question. The contest was really determined in the Patent Office between Allison and Pinkney and Green. Noninfringement, if it exists at all, must be due to the difference in means adopted by appellant to register the pan carrier to the skip while the machine is in motion. Each machine is provided with a hand wheel adjustment in the transmission between the skip mechanism and the pan carrier. The sole difference is found in the mechanism that intervenes between the hand wheel and the pan carrier. Appellant claimed that Green's wheels must be disconnected from his driving means to effect an adjustment, and, so disconnected, independent power transmission means, operable and driven by hand only, are provided, while in defendant's machine the manually operated means consist of bevel gears, whose rolling motion around the gear *60* is produced by the hand wheel *80*, the gears being in the power transmission.

To answer this contention, we must examine the claims, where we find no such limitation to the element there described as would defeat infringement because of this difference. This element in claim 40 reads:

"Means for setting said conveyer relatively forward or backward while in motion."

In claim 41 it reads:

"Manually operated means for accelerating or retarding the movement of said conveyer for the purpose of registering the pans with the skip."

As the examiner in the Patent Office well observed:

"Counts 1 and 2 (being claims 40 and 41 in the Green patent) are not necessarily limited to a construction where the normal driving mechanism for the conveyer continues in action after the means are put into operation."

"While in motion" refers generally to the machine. True, the pan carrier, too, is in motion. To advance the carrier, the "manually operated means" are used—simply by causing the "spring-pressed pawl" to engage the teeth of the gear. The operator turns the hand wheel and causes the carrier to move faster than it ordinarily drives when acceleration is desired, and slower if the operator wishes to retard the movement of the carrier. Nor does the use, in the specifications, of the word "independently," referring to this motion, limit appellee in construing these claims. The manual means act "independently" so far as acceleration or retardation is concerned, even though the driving means of the machine be attached or unattached. Acceleration as such is obtained independently of the machine provided means for driving the pans. It is obtained by the man-operated hand wheel. This is so in Green's patent machine, and it is true of the infringing machine. In both instances a continuously running machine is provided with a hand wheel, by which the operator can quickly adjust the pan carrier forward or backward without stopping the machine.

The defense of noninfringement of these claims really goes to the question of the ruling of the Patent Office in allowing Green to insert them in his patent rather than to the question of examining appellant's machine to ascertain whether it comes within the language of the claims. Appellant constructed its machine under the Allison and Pinkney patent. Claims 1 and 2 of that patent are identical with claims 40 and 41 of Green's patent. If Green was entitled to these two claims, it would ordinarily follow that a machine constructed under the former patent would infringe the latter.

Such differences as appear do not, we think, avoid infringement. Concluding, as we do, that the Patent Office was correct in its ruling, we also conclude there was infringement.

The decree is affirmed.

(257 Fed. 93)

UNITED STATES SLICING MACH. CO. v. WOLF, SAYER & HELLER, Inc.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2611.

PATENTS ⟹328—INFRINGEMENT—SHARPENER FOR MEAT-SLICING MACHINES—SUCCESSIVE MOVEMENTS.

The Stuckart patent, No. 1,039,210, for a sharpening device on meat-slicing machines, by "successive" movements to bring one grinder against the bevel edge, which requires more sharpening, and then to take such grinder out of engagement with such edge and bring the other grinder against the flat edge, *held* not infringed by a sharpener to grind both edges at the same time, with a stronger spring against the grinder for the bevel side, though the grinder for the bevel edge comes in contact slightly before the other, and can be stopped there.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the United States Slicing Machine Company against Wolf, Sayer & Heller, Incorporated. Decree for defendant (243 Fed. 412), and plaintiff appeals. Affirmed.

Frank T. Brown, of Chicago, Ill., for appellant.

Max W. Zabel, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellant's suit on the Stuckart patent, No. 1,039,210, September 24, 1912, for a sharpening device on meat-slicing machines, was dismissed on the ground that appellee's sharpener does not infringe.

Slicing machines and various sharpening devices were old. In the standard machine a rotary steel disk, slightly dished, is the slicer. The concave side terminates in the flat face of the cutting edge; the convex side, in the bevel face. The bevel face requires more grinding, as the flat face should be kept flat. On the flat face nothing is required but grinding away the burr or wire edge caused by grinding the bevel. Prior machines had sharpening means consisting of two grinders which normally were held away from the knife and which by movement of a lever were thrown into contact with the bevel and flat faces at the same time. Stuckart described an improved means in which one grinder was brought against the bevel face first, and then, after the bevel face was ground and while the grinder on that side had no farther movement toward the knife, the other grinder was independently brought against the flat face. In the Patent Office Stuckart distinguished his device from the prior art by pointing out that the movements of his grinders were "individual and successive."

On this disclosure Stuckart claimed:

"In a device for sharpening the rotary circular knife of a slicing machine, the combination of a sharpener movable into and out of engagement with the back of the knife, a sharpener movable into and out of engagement with the front of the knife, and means for causing such movements to be successive."

Appellee's sharpener, like those of the prior art, has two grinders on one support. When the lever is in one of its locked positions, the grinders are held away from the knife. When the lever is in the only other locked position that is provided, the grinders come into contact with the two faces with intended and practical simultaneity. On the bevel side a strong spring gives hard grinding, and on the flat side a weak spring gives light grinding; but both at the same time. Thus used, appellee's device obviously does not infringe.

But appellant proved a use in a meat shop wherein the lever of appellee's sharpener was stopped at a point between the "off" and "on" notches. When the lever is at such intermediate point one grinder contacts with the bevel face while the other is still away from the flat face, and when the lever is moved farther to the "on" position both grinders are in contact with the knife. No evidence was offered that appellee advised or knew of such use, which is contrary to its witnesses' sworn statement of intended operation. But even such use cannot, in our judgment, be counted as an infringement.

When appellee's lever is stopped at an intermediate point, the strong spring holds one of the grinders against the bevel face. When the lever is moved farther on, so that the other grinder contacts with the flat face, the first grinder is still strongly held against the bevel face. Thus the first and solitary grinding of the bevel face is ground over, and the actual sharpening is the result of the joint and synchronous action of the two grinders.

Appellee's sharpener is that of the prior art, with the addition of the contrastingly tensioned springs. Probably no sharpener of that type was ever built, or ever could be, in which the two grinders would touch the sides of the knife with exact mathematical simultaneity So every owner of an old sharpener would be found guilty of infringement on proof that in use the one grinder bore against the bevel face before the other touched the flat face, if such "successive" movements were within Stuckart's monopoly. Of course the claim cannot be allowed to have that retroactive grasp. "Successive," in Stuckart's combination, must be held to apply to those movements of the two grinders that are separate and independent of each other in time and place.

The decree is affirmed.

(257 Fed. 95)

JOSEPH HALSTED CO. v. UNITED STATES FIRE ESCAPE COUNTERBALANCE CO.

(Circuit Court of Appeals, Seventh Circuit. January 8, 1919.)

No. 2571.

PATENTS ⟹328—INFRINGEMENT—FIRE ESCAPE.

The Cowles patent, No. 705,042, claims 1 and 2, for improved fire escape, *held* infringed by ladder which used the same means to effect one of the several purposes which it affected in the patented ladder; but claim 3 of the same patent *held* not infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the United States Fire Escape Counterbalance Company against the Joseph Halsted Company for infringement of three claims of a patent. Decree for complainant (246 Fed. 947), and defendant appeals. Decree modified, so far as it adjudged infringement of claim 3, and, as modified, affirmed.

John W. Hill, of Chicago, Ill., for appellant.

Frank T. Brown, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. A statement of the character and scope of this patent and a description of the infringing fire escape, as well as a carefully prepared opinion by Judge Sanborn, appears in 246 Fed. 947. In view of the description there appearing, it is unnecessary for us to deal with more than one question, that of infringement by the Smyth fire escape.

Appellant's principal attack on the decree arises out of the defense of noninfringement, so far as it relates to the ladder which it built on the Smyth building. Agreeing, as we do, with the conclusions of the District Judge, we will briefly consider this phase of the case. Much of the difficulty in determining this question is due to the use, by expert witnesses and others, of the words "torsional" and "rigidity." Appellant claims that its ladder has no torsional member, such as is referred to in claim No. 3. In fact, it claims its ladder is rigid, and a torsional member is required only in a flexible ladder. In other words, appellant claims that the Cowles patent does not cover a ladder that is braced or stayed so as to be rigid.

It seems to us too much emphasis is placed upon the strict definition of words used by witnesses, as distinguished from the real meaning of the witnesses who testified. For example, rigidity in a ladder is necessarily a relative term. The longer the ladder, and the fewer and less effective the braces, the greater the flexibility, the less the rigidity. The size and character of the material may also affect its rigidity. Likewise the "device for aiding in the support of the other side thereof and mechanism co-operating with said last-mentioned supporting device" may well be said to describe a "torsional member,"

as well as "means for twisting the rod," and this member would nevertheless add to the ladder's rigidity.

Appellant's "sleeve," which passes from the outside to the inner side of the ladder and constructed in the manner disclosed by the testimony, appears to us to be the mechanical equivalent of element 3 in claims 1 and 2, regardless of whether the witness calls it "a torsional member" or "an anti-torsional rod." It is worthy of notice that nowhere in the claim does patentee refer to this element as a "torsional rod." The only place where the word "torsional" appears is in claim 3, and there patentee speaks of a "rod subject to torsional strain." The Patent Office, speaking of the Seymour patent, which appellant claims it followed, and referring particularly to this sleeve says: "It is rather the rigidity of the sleeve which is its distinguishing character." Of course, the sleeve itself was rigid, and it imparted to the ladder added rigidity. Each step in the ladder contributed likewise to its rigidity.

But appellant trespassed on patentee's rights when it adopted the means that, incidentally perhaps, added rigidity to its ladder, but clearly, and as we think purposely, provided a supporting device for the other side of the ladder, just as was described by Cowles in his patent. Rigidity as such was obtainable in many ways. If it was rigidity alone that appellant sought, it was most unfortunate in adopting the means pre-empted by appellee. Results, other than rigidity, which the testimony indicated were extremely desirable, were accomplished by these means which Cowles covered by his patent, and appellant cannot well complain when adjudged a trespasser for using this one "means" or its equivalent, out of the dozens that were open to him.

The experiments made by plaintiff's expert witnesses with the Smyth structure prove only too conclusively that the "sleeve" which appellant used served the same object and was for the same purpose as the "means for supporting the other side thereof" described and defined in the Cowles patent.

By reason of the particular "means for supporting the other side thereof" described in the third claim of the patent, we conclude there is no infringement thereof disclosed by appellant's fire escape constructed on the Smyth building.

The decree is modified, so far as it adjudges appellant to have infringed claim 3 of the patent by the so-called Smyth structure, and, as modified, is affirmed, with costs.

(257 Fed. 225)

INTERSTATE BUSINESS MEN'S ACC. ASS'N OF DES MOINES, IOWA, v. LESTER.*

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5204.

1. INSURANCE ⟹453—ACCIDENT INSURANCE—CHANGE OF OCCUPATION—"OCCUPATION OF PHYSICIAN AND SURGEON."

A physician, who at the time of insurance and of his death was in the general practice, and was also a medical officer in the state National Guard, with the rank of major, and who on the day he was killed, after visiting his patients, had gone out, as surgeon only, with a detachment of the guard which was on emergency service at the town of his residence during a strike, *held* to have been "engaged in the occupation of physician and surgeon," within the terms of the policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Occupation.]

2. INSURANCE ⟹453—ACCIDENT INSURANCE—CHANGE OF OCCUPATION.

To constitute a change of occupation from that specified in a life or accident policy, it must be abandoned and some other calling adopted.

3. INSURANCE ⟹146(3)—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—EXCEPTIONS FROM RISK.

If the language of a life or accident policy does not express an exception, when fairly interpreted, the courts will not write an exception into it by interpretation, for the purpose of exempting the insurer from liability after death or accident.

4. INSURANCE ⟹455—ACCIDENT INSURANCE—RISKS—EXPOSURE TO INJURY OR DEATH.

If a person holding a policy insuring him against accidental injury does something which culpably provokes or induces the act causing his injury or death, then the result is not accidental; but, if he is wholly free from culpability himself, the result is accidental as to him, though it may have been within the deliberate intent of the aggressor.

5. INSURANCE ⟹455—ACCIDENT INSURANCE—DEATH FROM ACCIDENT—"ACCIDENTAL DEATH."

The death of a physician, who was a medical officer in a National Guard regiment, and who was shot and killed while performing his duty as such officer with a detachment of the guard detailed to preserve order during a strike, *held* accidental, within the meaning of an insurance policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident; Accidental.]

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action by Edith A. Lester against the Interstate Business Men's Accident Association of Des Moines, Iowa. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert M. Haines, of Des Moines, Iowa (S. D. Bishop, of Lawrence, Kan., and Dunshee, Haines & Brody, of Des Moines, Iowa, on the brief), for plaintiff in error.

Henry H. Asher and M. A. Gorrill, both of Lawrence, Kan., for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 250 U. S. —, 40 Sup. Ct. 11, 64 L. Ed. —.

AMIDON, District Judge. This action was brought by the plaintiff, Mrs. Lester, against the Insurance Association, as defendant, to recover on an accident policy covering the life of her husband, Dr. Pliny P. Lester. The policy insured him "while he is engaged in the occupation of a physician and surgeon * * * in case of death effected directly and independently of any other contributing, concurring or intervening cause, by external violent and accidental means." When the insurance was taken out, in January, 1913, and at the time of his death, Dr. Lester was engaged in the practice of his profession at Walsenburg, in the state of Colorado, which is one of the important towns in the district covered by the mining operations of the Colorado Fuel & Iron Company. He was also a member of the National Guard of Colorado, holding the rank of major, and assigned to the medical corps. During the fall of 1913, and the winter and spring of 1914, the employés of the Colorado Fuel & Iron Company were engaged in a strike, which for months assumed the form of belligerent opposition to the authorities of the state. The Governor called the National Guard into service to protect life and property in the district. Dr. Lester joined his company as a part of its medical corps. He was not otherwise connected with the military operations. He was equipped with no gun or sword. The only weapon upon his person was a pistol, which he carried in his pocket. He wore the insignia of the Red Cross, and his work was confined to caring for the sick and wounded. At times his service seems to have taken him away from his home town. Part of the time he was at Ludlow, but at the time of his death he was stationed at Walsenburg, and was engaged there in the practice of his profession, and at the same time performing such duties as were necessary in connection with the military force that was located in the city, numbering about 600 men. On the morning of April 29, 1914, he visited a number of his patients in Walsenburg, professionally. He then went with a small detachment, consisting of 30 men, to a point a few hundred yards from the city; the force having been sent out to reconnoitre and resist, if necessary, the activities of strikers who were in the foothills or mountains near the town. The lieutenant of this force was wounded. Dr. Lester had just finished dressing his wound, and was down on his hands and knees in a railroad cut observing some men through his field glass, to decide whether they were strikers or soldiers. He was shot, and died almost instantly.

The case was tried in the lower court before a jury, but at the conclusion of the evidence motions were made by both parties for a directed verdict. The jury was excused, pursuant to written stipulation, and the case submitted to the judge for decision. He found in favor of the plaintiff, and entered judgment for the full amount of the policy. The Insurance Association brings error to review that judgment.

In the trial court and here the case turns wholly upon two questions: (1) Was Dr. Lester at the time of his death "engaged in the occupation of a physician and surgeon"? (2) Was his death effected wholly by "accidental means"?

[1] In our judgment the first question is answered by the stipulation of facts, which was signed by the parties. It reads as follows:

"It is agreed and hereby stipulated by and between the parties to this action that the insured, Dr. P. P. Lester, was on the 17th day of January, 1913 [the date of the policy], a resident of Walsenburg, Colo.; that at that time his only occupation was that of a physician and surgeon, and that his duties were fully described as those of 'general practice'; that he continued in the general practice of medicine and surgery in and about Walsenburg, Colo.; and that on the morning of April 29, 1914, he called professionally and rendered professional services to several of his patients in the vicinity of Walsenburg.

"It is further agreed and hereby stipulated that the said Dr. P. P. Lester was on the 17th day of January, 1913, a surgeon in the medical corps of the Colorado National Guard, and continued to be such until the time of his death, at which time he held the rank of major, and was performing the duties of a surgeon in the said medical corps of the Colorado National Guard; that at all the times above mentioned he was a member of the American Red Cross Society."

This, in our judgment, shows beyond reasonable controversy that Dr. Lester, at the time of his death, was engaged in the occupation of a physician and surgeon. This is the showing, not only of the stipulation, but of the evidence.

[2] The defendant insists that the language of the policy, when fairly interpreted, confined Dr. Lester to the practice of his profession in the ordinary walks of civil life; that, when he joined his company in the military service to which it was called, he changed his vocation and became, instead of a physician and surgeon, a soldier. We do not think this position can be sustained without disregarding the facts. His service with his company was temporary. He was called out to meet an emergency. While the service lasted for some months, it was a side issue. It was known that it would be temporary, and was to be considered as answering a call to suppress a riot, or any other temporary engagement. This measures the term of the service; but we are to look at the character of the service also. Dr. Lester was in no way engaged in the military activities of his company. His services there were those of a physician and surgeon. He continued to practice his profession at Walsenburg, as well as attend to the needs of his company. The authorities are uniform that such temporary changes do not constitute a change of occupation within the meaning of insurance policies. To constitute such a change there must be an abandonment of the vocation specified in the policy and the adoption of some other calling. The record here affirmatively shows that there was no such change; on the contrary, it shows that Dr. Lester was engaged on the very morning of his death in the practice of his profession in the community where he resided, and, so far as his service in the company is concerned, it shows that he was there also engaged in the occupation of a physician and surgeon, and had been practicing that profession only an instant before his death. If such temporary activities are to destroy the protection of insurance, it must be by an express provision in the policy. Such exceptions have long been a feature of accident contracts. Their omission must be held to spring from deliberate purpose.

The language of Judge Hook, speaking for this court in Railway Mail Association v. Dent, 213 Fed. 981, 983, 130 C. C. A. 387, 389 (L. R. A. 1915A, 314), is equally appropriate here.

"So many and varied are the causes of accidental injury that the particular language employed in instruments of insurance is of the greatest importance. A word added or omitted may alter materially the scope of the indemnity. Many cases like the one at bar lie close to the border line, perhaps, because not definitely in mind for inclusion or exclusion; but it is a delicate thing for a court to adopt the latter course, merely upon a supposition that they would have been excluded in terms, had they been thought of. The insurer most familiar with the subject chooses the words of his undertaking, and it is not unjust to take them in the sense conveyed to the ordinary reader, nor to hold against him in case of real substantial doubt."

[3] What the company is really asking us to do is to amend its policy, and write into it an exception to the effect that, if the insured should engage in any military service the insurance should cease. It urges this upon the ground that the hazard of the service which Dr. Lester was performing was so much greater than the hazard which attends the ordinary life of a physician and surgeon that the court must find that it was not within the contemplation of either party to the contract. It may be that, if the subject had been brought clearly before the minds of the parties, some provision would have been made in the policy with respect to such hazards. But for the court to amend the policy, and write into it by interpretation an exception which is in no way expressed in its language, would violate every rule with which we are familiar for the interpretation of insurance contracts. If their language does not express an exception, when fairly interpreted, the courts have uniformly refused to write an exception into them by interpretation, for the purpose of exempting the company from liability after death or accident. It is a rule as old as insurance, and has been stated and enforced in countless decisions, that such instruments are prepared by the company; they have been the result of long development and very careful choice of language. If the language is open to doubt, the doubt will be resolved in favor of the insured. Here the language does not even furnish a ground for doubt.

In so far as vocation is a factor in determining the hazard, it is based upon the average of the whole class. It contemplates that each individual will in the course of his life necessarily be exposed to varying degrees of hazard. It is likewise true that the actuaries recognize that different individuals in the class will vary greatly in the extent of hazard to which they are exposed. A physician practicing his profession in the congested districts of a large city, for example, will be exposed to many hazards to which a physician in a small country town will not be subject. All of these matters, however, are embraced in the general average of hazards of the class of physicians and surgeons. If one individual at one time is exposed to a largely increased hazard, as Dr. Lester was on the occasion of his death, others will be exposed to hazards falling greatly below the average. These are the factors upon which the insurance is based.

Men holding accident policies do not have to enter into nice calculations to determine whether they are stepping into a field of greatly increased hazard or not in following their vocations. They may go about their course of life, knowing that they are protected by their insurance, unless they enter a hazard which is expressly excepted from their policy.

The parties to the contract here had under consideration the subject of exceptions. It provides that there shall be no liability for an injury sustained when the member is:

"(1) Insane. (2) Not in the present full possession and normal exercise of all his faculties. (3) Engaging in any act in violation of any law or ordinance."

The fewness of exceptions in such policies is constantly urged as a ground for accepting the insurance by agents and solicitors. To add to the list of activities which should forfeit the insurance, after accident or death, would be a fraud upon the insured. The uniform holding of the courts has been along the lines which we have stated. The law is elementary, and we cite a few cases which illustrate and apply the rules: Gotfredson v. German Com. Acc. Co., 218 Fed. 582, 134 C. C. A. 310, L. R. A. 1915D, 312; Wildey Casualty Co. v. Sheppard, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650; Union Mut. Acc. Ass'n v. Frohard, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664; Taylor v. Ill. Com. Men's Ass'n, 84 Neb. 199, 122 N. W. 41, 24 L. R. A. (N. S.) 1174; Fox v. Masons' Fraternal Acc. Ass'n, 96 Wis. 390, 71 N. W. 363; Hess v. Pref. Masonic Mut. Acc. Ass'n, 112 Mich. 196, 70 N. W. 460, 40 L. R. A. 444; Eggenberger v. Guar. Mut. Acc. Ass'n (C. C.) 41 Fed. 172.

Was Dr. Lester's death "accidental"? Whether it was intended by the person who fired the fatal shot is matter of conjecture. That, however, is not material. The word, as used in the policy, is a term of art. To answer the question we must consider the event from the point of view of Dr. Lester. Was it accidental as to him? Defendant says it was not, because he knowingly and consciously exposed himself to the very hazard which caused his death, and must have contemplated such a result as a natural and probable consequence of the service in which he engaged. It is insisted that, to be accidental within the meaning of the policy, the result must have been "unforeseen and unexpected." We do not regard this view as sound, either in law or upon principle. Persons protected by accident insurance may incur consciously hazards which may result in their injury or death without forfeiting the insurance, unless the policy expressly excepts the hazard. In the course of life men are constantly required to pass into environments of greatly increased hazard. They may do that knowingly, and, if injury or death results, it does not forfeit their insurance, unless they do something which directly and immediately contributes to produce the act from which their death or injury results. For example, for several years past there have been districts in most of our large cities at certain seasons of the year in which there have been habitual assaults upon peaceful citizens by highwaymen. Men have been well aware of the risks of going upon the streets in such districts alone. They may have been so far conscious of the risks as to arm themselves for protection. And yet any peaceful citizen, who has in the pursuit of business or pleasure incurred these hazards, is entitled to claim, if he is injured or killed by highwaymen, that as to himself the result is accidental.

[4] So it is not true that simply going into an environment of great-

ly increased hazard, with conscious knowledge of such hazard, will cause injury or death which results therefrom not to be accidental within the meaning of such policies as we have before us here. Even in case of personal encounter, if the party wounded or killed is wholly free from fault, his injury or death is accidental within the meaning of the term as used in accident insurance. This has been the uniform holding of the courts. The line of distinction is this: If the party does something which culpably provokes or induces the act causing his injury or death, then the result is not accidental; but, if he is wholly free from culpability himself, the result is accidental as to him, though it may have been within the deliberate intent of the aggressor.

[5] Within this rule the death of Dr. Lester was clearly accidental. He did nothing to provoke or induce the act which resulted in his death. In the pursuit of duty he simply exposed himself to the hazard of the service. He mav have contemplated death or injury as possible, or even probable; but, if he did, this would not take him out of the protection of his accident insurance. So far as we are able to discover from the authorities and text-writers, this is elementary law at the present time. It is possible to build up an argument to the contrary only by catching at phrases and single sentences, and separating them from the real scope of judicial decision. We content ourselves with referring to a few of the many cases which illustrate and enforce the rule. Ripley v. Railway Pas. Ass'n Co., Fed. Cas. No. 11854; Robinson v. Mut. Acc. Ass'n (C. C.) 68 Fed. 825; Talliaferro v. Travelers' Prot. Ass'n of America, 80 Fed. 368, 25 C. C. A. 494; Lovelace v. Travelers' Prot. Ass'n of America, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638; State Life Ins. Co. v. Ford, 101 Ark. 513, 142 S. W. 863; Campbell v. Fid. & Cas. Co., 109 Ky. 661, 60 S. W. 492; Supreme Council v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Union Cas. & Surety Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873; Travelers' Prot. Ass'n v. Fawcett, 56 Ind. App. 111, 104 N. E. 991; Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; Hutton v. States Accident Ins. Co., 267 Ill. 267, 108 N. E. 296, L. R. A. 1915E, 127, Ann. Cas. 1916C, 577; American Ins. Co. v. Carson (Ky.) 30 S. W. 879.

The judgment of the trial court is clearly right, and it is affirmed.

(257 Fed. 230)

STEBBINS v. SELIG.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919. Rehearing Denied May 31, 1919.)

No. 5168.

1. COURTS ⟹405(5)—CIRCUIT COURTS OF APPEALS—APPELLATE JURISDICTION —CASE INVOLVING JURISDICTION OF LOWER COURT.

Where the jurisdiction of a District Court depended upon whether a paragraph of the complaint stated a cause of action for special damages claimed therein, without which the amount involved was below the jurisdictional limit, a writ of error to review a judgment sustaining a de-

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

murrer to such paragraph and dismissing the action was properly taken to the Circuit Court of Appeals.

2. DAMAGES ⟹23—FAILURE TO PERFORM CONTRACT—SPECIAL DAMAGES WITHIN CONTEMPLATION OF PARTIES.

In an action for breach of a written contract by defendant to drill an artesian well and install a pump therein for irrigation purposes, damage to a rice crop on land which the well was intended to irrigate, based upon the difference between the rice crop actually raised and a rice crop raised on any adjoining land, resulting from failure to perform the contract, *held* not recoverable as special damages, in the absence of any provision in the contract indicating that such damages were contemplated by the parties.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by Lewis A. Stebbins against A. F. Selig. Judgment for defendant, and plaintiff brings error. Affirmed.

L. A. Stebbins, of Chicago, Ill., X. O. Pindall, of Little Rock, Ark., and Paul E. Price, of Chicago, Ill., for plaintiff in error.

Thomas S. Buzbee, George B. Pugh, and Harvey T. Harrison, all of Little Rock, Ark., and O. M. Young and John M. Wilson, both of Stuttgart, Ark., for defendant in error.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. The plaintiff in error, hereafter plaintiff, sued the defendant in error, hereafter defendant, to recover damages for the breach of a contract in writing, entered into between the plaintiff and defendant on June 22, 1916, whereby the defendant in consideration of $2,000 agreed to drill an irrigation well on the Stebbins farm, near Olena, Ark., and install a pump therein within 20 days from date of contract. The complaint set out the contract, alleged that defendant wholly failed to perform the same, and that in consequence thereof plaintiff was compelled to make a new contract for the same purpose with the Layne & Bowler Company, at a difference in cost of $675 over and above what the well and pump would have cost if the defendant had performed his contract. The complaint then alleged by way of special damage as follows:

"(4) Plaintiff further alleges that the said field upon which the defendant had obligated himself to sink a well and install a pump as aforesaid was a field well suited for the growth of rice, and was intended and was in fact used for the cultivation of rice. The plaintiff further alleges that it is a well-known fact that rice cannot be cultivated successfully unless the field upon which the rice has been sown is kept flooded by a constant supply of water, and defendant well knew that the plaintiff contemplated using the said field upon which the defendant had agreed to sink a well and install a pump as aforesaid for the purpose of raising and cultivating rice, and that the sole purpose of the plaintiff in contracting for the sinking of the well and the installation of a pump as aforesaid was to secure a constant supply of water for his rice crop. Plaintiff further alleges and avers that the said defendant was engaged in the business of sinking wells for rice fields and for no other purpose, and had been engaged in said business for a great many years, and was thoroughly familiar with the rice-growing industry, and by reason of his ex-

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

perience well knew that rice could not be successfully cultivated unless the field upon which the rice has been sown is kept flooded by a constant supply of water, and that the direct and immediate result of his failure and refusal to complete a well and install a pump must necessarily be grave and serious damage to the rice crop of the plaintiff; and the plaintiff further alleges and avers that, as a direct and proximate result of the failure of the said defendant herein to comply with the said contract as aforesaid, the rice crop upon said land became and was greatly damaged and injured, because of the inability of the plaintiff to inundate said lands with water for the period following the date on which said defendant agreed to complete the said well and install the said pump hereinbefore referred to, and the time within which the said Layne & Bowler Company were able to complete their said well and install their said pump, and that the said well so constructed and the said pump installed by the said Layne & Bowler Company was and is of the same general kind and character as that which the defendant herein had agreed and obligated himself to construct, erect, and install, and upon its completion yielded a constant supply of water per minute equal to the amount guaranteed to be furnished by the said well and pump which the defendant had obligated himself to erect and construct.

"The plaintiff further alleges and avers that the sole and only means of flooding or inundating the said field, upon which the defendant had agreed to sink a well and install a pump as aforesaid, was by means of said well and pump as aforesaid, and the said defendant well knew that the sole and only means of flooding and inundating said field was by means of said well and pump, which he had agreed to sink and install as aforesaid, and that the plaintiff had no other means or facilities for flooding or inundating said field.

"The plaintiff alleges and avers that the lands upon which the defendant had agreed to sink a well and install a pump as aforesaid, and over which the waters from the said well were intended to flood, and which were in fact flooded, by the said well and pump subsequently sunk and installed by the said Layne & Bowler Company, as hereinbefore set forth, yielded 4,440 bushels, and that other land of the same kind and character and of the same acreage, which was properly flooded at all times as this land would have been had not the defendant wholly neglected and refused to complete his contract, as aforesaid, yielded rice greatly in excess of this land, to wit, from 3,200 to 5,600 bushels more of rice.

"The plaintiff further alleges and avers that the sole and only reason for the difference in yield between the said field upon which the defendant had agreed to sink a well and install a pump as aforesaid, and the field of the same acreage hereinbefore referred to, was the fact that the said field upon which the said defendant had agreed to sink a well and install a pump as aforesaid was, by reason of the failure of the defendant to comply with his said contract, without water for a long space of time, to wit, 10 days from the 12th day of July, A. D. 1916, the date upon which the said defendant had agreed to complete the said well and pump as aforesaid, until the plaintiff was able to secure the completion of a well and the installation of a pump by the said Layne & Bowler Company as hereinbefore set forth, and that if the said field upon which the said defendant had agreed to sink the said well and install the said pump as aforesaid had been properly supplied with water from the 12th day of July, A. D. 1916, as aforesaid, and had not been without water for a long space of time, to wit, from the 12th day of July, A. D. 1916, to the 22d day of July, A. D. 1916, the date upon which the said Layne & Bowler Company's well and pump as aforesaid were completed and placed in operation, to wit, 10 days, the yield of the said field upon which the said defendant had contracted and agreed to sink a well and install a pump as aforesaid, would have been the same, or nearly so, as the said lands hereinbefore described, which were properly supplied with water at all times, and so by reason of the premises the plaintiff lost and was wholly deprived of a vast quantity of rice, which he otherwise, in the ordinary course of events, would have received, except for the failure of the defendant to comply with his said contract as aforesaid, to wit, the difference between the average yield of adjoining

rice fields of the same acreage and character, which were properly supplied with water at all times, and the said field upon which the said defendant had wholly neglected to sink a well and install a pump as aforesaid, in accordance with his agreement, to wit, 3,200 bushels of rice. The plaintiff states that the fair current market price for rice of the kind and character grown on this land, in the month of October, 1916, when said rice was threshed, was $1.10 per bushel. Wherefore the plaintiff says that he was damaged in the sum of $3,500, the fair market value of said rice, and prays judgment for this amount."

[1] The defendant demurred to said paragraph 4 on the ground that the complaint did not state a cause of action for the damages claimed in said paragraph, and demurred to the complaint without said paragraph on the ground that it did not state a cause of action within the jurisdiction of the court. The court below sustained the demurrer, and, the plaintiff electing to stand upon his complaint, the same was dismissed for want of jurisdiction. On this state of the record, counsel for defendant suggests that plaintiff ought to have gone directly to the Supreme Court by virtue of section 238, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. § 1215]). We are of the opinion that the case was properly brought here, because, conceding there was a question of jurisdiction after the elimination of paragraph 4, resulting from the fact that the damages claimed would be less than $3,000, still that was not the only question in the case, and the judgment of the court below must be construed in our opinion as equivalent to a holding that the complaint did not state a cause of action. R. J. Darnell v. I. C. Ry. Co., 225 U. S. 243, 32 Sup. Ct. 760, 56 L. Ed. 1072. The procedure in this case is not the same as in Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171, hereafter referred to.

[2] In the case last mentioned there was no question but that of jurisdiction. The litigated question, below and here, was and is whether the special damages alleged in paragraph 4 may be recovered by reason of the nonperformance of the contract by the defendant. We have no doubt of our jurisdiction. In considering the question of special damage we must remember that the contract between the parties was in writing and contained no expression as to what the damages should be in case either party wholly failed to perform it. The general rule is that a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. Under this rule the plaintiff in the present case could clearly recover in the proper forum the sum of $675, which he alleges was the excess paid to the Layne & Bowler Company for doing the same work that the defendant agreed to do. Parties, when they make contracts, contemplate performance, not breach; therefore they do not usually say anything about consequences in case of breach by either party. In this situation the law establishes a rule by which it may be determined with reasonable certainty what the parties would have said, had they spoken in their contract. Thus arises the rule, above stated, that parties who break their contracts are to be held responsible for such consequences as may be reasonably supposed to be in the contemplation of

the parties at the time of making the contract. The rule being thus established, the next question that arises is: How shall it be determined what the consequences were which the parties to a contract contemplated when they entered into the same? It has been decided that these consequences may be shown by oral evidence when the contract is in writing. It has also been decided that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account, if he fails to deliver the goods. As was said by Mr. Justice Willes in British Columbia Saw Mill Co. v. Nettleship, L. R. 3 C. P. 499, 508:

> "The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."

In this case the special condition would be that defendant entered into the contract in question, knowing that the plaintiff reasonably believed that, if the defendant wholly failed to perform the contract, he would be liable to the plaintiff for the difference between the value of the rice crop raised upon plaintiff's land and the value of the rice crop raised upon any adjoining land; this difference amounting in the present case to $3,500. One way of testing whether the defendant contemplated this consequence is to suppose that, had defendant been asked to agree to a clause in the contract that would make him liable in the way specified, would he have assented to the same? In our judgment there can be but one answer to this question: He would not. The foregoing principles of law are fully illustrated and sustained by the Supreme Court of the United States in Globe Refining Co. v. Landa Cotton Oil Co., supra, where the cases, English and American, are cited.

This case in our opinion fully sustains the ruling of the trial court. While the complaint shows that the defendant was in the business of sinking wells for the irrigation of rice lands, and knew that the plaintiff wanted the water to be pumped from the well in question to be used for the growing of rice, there is no showing, in our opinion, that the plaintiff believed or contemplated, or that it was in the contemplation of either party, that if the defendant failed to perform the contract within 20 days he would be liable for the difference in value between the rice crop of the plaintiff and any rice crop raised upon any adjoining land. The authorities upon the question of damages for the breach of contracts are innumerable, but in the view we take of the case we are controlled by the case last cited.

We have considered the case of Harrington v. Blohm, 206 S. W. 316, in the Supreme Court of Arkansas. It is not a parallel case to the one at bar, and in so far as it is in conflict with Globe Refining Co. v. Landa Cotton Oil Co., supra, could not be followed by us.

The judgment below is affirmed.

STONE, Circuit Judge, dissents.

(257 Fed. 235)

BROOKS-SCANLON CO. v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 7, 1919.)

No. 3285.

1. SALES ⟹79—AMBIGUITY IN CONTRACT—UNDERSTANDING OF PARTIES.
Where the application of the facts to the expression "f. o. b.," used in a contract of sale, was a matter of doubt and controversy, it was a proper subject for an understanding between the parties, and, such an understanding having been reached, it was not in conflict with the effect of the letters, but merely defined the application of the expression.

2. SALES ⟹88—MEANING OF CONTRACT—QUESTION FOR JURY.
In a railroad's action to recover from the seller an excess, paid under a contract whereby lumber was purchased "f. o. b." its rails, issue as to the understanding of the parties regarding the meaning of the expression "f. o. b." *held* for the jury under the evidence.

3. SALES ⟹87(3)—CONSTRUCTION OF CONTRACT BY PARTIES—SUFFICIENCY OF EVIDENCE.
Evidence *held* to warrant jury in finding that letters "f. o. b." were accepted by both parties as referring alone to charges connected with handling and loading the sold lumber at shipping point, and as not having reference to charges conditional in character and the existence of which resulted from the subsequent action of the buyer railroad.

4. SALES ⟹54—PRACTICAL CONSTRUCTION OF CONTRACT—SELLER'S RIGHT TO ACCEPT.
A company which sold lumber to a railroad, contracting to supply it "f. o. b." its rails, had the right to accept and act on a practical construction of the contracts as to the meaning of the letters by the railroad.

5. ESTOPPEL ⟹72—MISLEADING MISTAKE—PROTECTION OF PARTY WHO HAS SUFFERED.
Where one of the parties to a sale has been misled to his disadvantage by the conduct of the other, based on mistake, when he had a right to assume the other was acting with full knowledge of the facts, and it being impossible for the parties to be restored to their original condition, the party who has suffered by the mistake will be protected.

6. SALES ⟹79—CONSTRUCTION OF CONTRACT—RIGHT OF RELIANCE.
Where a company, which sold lumber to a railroad "f. o. b." its rails, made its prices with reference to the railroad's practical construction of the contract, in relation to such letters, by payment of the lumber company's bill without deduction of payments made by a division of the railroad, and such construction was followed thereafter, the railroad cannot recover back part of the payments made on the ground that the construction was erroneous.

7. SALES ⟹88—ACTION FOR OVERPAYMENT—ISSUE OF ESTOPPEL.
In an action by a railroad to recover from a lumber company alleged overpayments on purchases of lumber, issue of estoppel of the railroad to claim any overpayment, on the ground that it had practically construed the contracts between the parties, *held* to be submitted to the jury for determination.

Walker, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by the Illinois Central Railroad Company against the Brooks-Scanlon Company. To review a judgment for plaintiff, defendant brings error. Reversed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Robert R. Reid, of Amite, La., and W. E. Lamb, of Chicago, Ill., for plaintiff in error.

R. V. Fletcher, of Chicago, Ill., and Gustave Lemle and Hunter C. Leake, both of New Orleans, La. (Lemle & Lemle, of New Orleans, La., and Blewett Lee and W. S. Horton, both of Chicago, Ill., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. On a former appeal (Ill. Cent. R. R. Co. v. Brooks-Scanlon Co., 241 Fed. 445, 154 C. C. A. 277) judgment for Brooks-Scanlon Company was reversed. Upon a retrial, judgment was for the Illinois Central Railroad Company.

Suit was instituted by the railroad company on December 8, 1914. Plaintiff alleged that during the years 1907 to 1912, inclusive, the railroad, on various dates, purchased lumber from the Brooks-Scanlon Company; that each contract provided for delivery to petitioner "f. o. b." its rails; that the lumber was manufactured by the lumber company, at mills at Kentwood, La., from logs carried into Kentwood by the Kentwood & Eastern Railroad Company; that at the time of each of the purchases there was in effect an agreement between the Illinois Central Railroad Company and the Kentwood & Eastern Railroad Company for a division of freight rates, by which, on all lumber manufactured from logs brought over the Kentwood & Eastern into Kentwood, and manufactured there, and shipped over the Illinois Central to territory known as "Central territory," the Kentwood & Eastern would be allowed 2½ cents per 100 pounds; that this agreement was known to the lumber company; that the lumber purchased was shipped by the Illinois Central to destinations within this territory, as it was understood it would be at the time the purchases were made; that, by reason of the joint tariffs, it was obligatory on the Illinois Central to pay, and it did pay, to the Kentwood & Eastern, on lumber so purchased from the lumber company (indicated by attached exhibits) the agreed division rates, amounting in the aggregate to $25,643.29; that the lumber company, having agreed to make deliveries "f. o. b.," was under obligations to pay the expenses of the transportation from the point of origin on the Kentwood & Eastern to the Illinois Central rails. There were also allegations as to the manner of payment, indicating the causes of the errors in making payments to the lumber company without deducting amounts paid to the Kentwood & Eastern.

The answer alleged that it was the understanding of the Illinois Central and the lumber company, at the time of the delivery, that the expressions "f. o. b.," or "f. o. b. cars," or "f. o. b. cars I. C. tracks, Kentwood," required the defendant to deliver lumber on board cars on the tracks at defendant's mill in Kentwood, and that the cost of the service in making such delivery at such point, in loading the lumber into said cars, and any other costs or charges that had accrued at the time and place of delivery, would be borne by defendant and included in the prices named; that with this understanding, upon receipt of each written order, the defendant inserted therein the prices it was will-

ing to receive, which prices were accepted by petitioner, with the understanding that they included delivery at the point and under the conditions stated; that the lumber so specified was thereafter delivered on tracks at defendant's mill in Kentwood, and that for this lumber petitioner paid defendant's invoices at the prices so specified without objection or claim of incorrectness; that any future charges that accrued or would accrue on said cars after delivery, by reason of their transportation from Kentwood to Central points, were to be borne by petitioner; that any charges accruing as the result of any action by the railroad after the lumber was received would be borne and paid by petitioner; that there were no unpaid transportation charges upon the lumber, or the logs from which it was manufactured, and that the lumber was delivered to the railroad at Kentwood free and clear of charges of every kind and nature; that it was never contemplated by petitioner and defendant that the expenses for the transportation of the lumber, or the material from which it was manufactured, should not be paid by the railroad; that the prices were fixed by defendant for the lumber with reference to the understanding that the division charges should be borne by the purchaser; that the payments to defendant, without deduction for the division charge, were made with full knowledge of all the facts, and that plaintiff is estopped from claiming from defendant the amounts paid to the Kentwood & Eastern.

In the opinion rendered on the former appeal it is said:

"It is not questioned, and, under the evidence adduced, it is not open to question, that the terms 'f. o. b.,' 'f. o. b. cars,' 'f. o. b. cars Illinois Central tracks, Kentwood,' as used in the contracts of sale and purchase, obligated the seller to pay freight charges incurred for the shipment of the lumber or the logs out of which it was manufactured, to the point at which the lumber bought was to be delivered to the plaintiff by the seller, the Brooks-Scanlon Company; that plaintiff was entitled to a delivery of the lumber on its line free of charges."

Upon the former trial the Brooks-Scanlon Company introduced no evidence, and the case was determined upon the pleadings of the parties and the evidence introduced by the plaintiff. Upon the second trial the pleadings were unchanged, but evidence was introduced by the lumber company upon the defensive issues made.

[1] The expressions "f. o. b." "f. o. b. cars," "f. o. b. tracks," etc., are as free from ambiguity as most other words and symbols. But, however well defined words used in a contract may be, it is frequently the case that there can be no proper determination of the meaning of a contract without an understanding of the circumstances and conditions with reference to which it is made. The meaning of a word is sometimes indicated by the context, and sometimes dependent upon the conditions under which it is used. While the letters "f. o. b." carry the idea that the delivery is to be made without a charge for prior transportation service, the use of the expression would not preclude inquiry as to what would be regarded as within such charges, if the conditions were different from those under which it had acquired the ordinary business significance. If the circumstances raised such a question, the doubt would furnish a proper occasion for an understand-

ing between the parties. The facts developed are that the lumber company, when it shipped logs to Kentwood, paid all the charges payable to the Kentwod & Eastern for the service, with the understanding that, if the company received an additional sum for the service, the amount would be returned to the lumber company; the railroad retaining its full original pay. Under these circumstances, and in the absence of an understanding, when the Illinois Central received lumber cut from these logs, and, because of its shipment into certain territory, had to pay a sum in addition to the stipulated price, it might be held that the lumber was not received "f. o. b." But an inquiry could naturally arise, under the conditions detailed, as to the meaning of the expression and the scope of its application. At the time of the sale, no charges were due or payable. The lumber, however, was, under certain conditions, subject to an additional charge, based upon a service already rendered. There was no patent ambiguity in the expression used. There was no doubt about the facts. But the application of the facts to the expression could well be a matter of doubt and controversy; and, being the subject of either, it was a proper subject for an understanding between the parties affected. Such an understanding having been reached, it would not be in conflict with the effect of the letters "f. o. b.," but would define the application of the expression. While these initial letters ordinarily have a sufficiently clear and definite meaning, not requiring limitations or explanations, the circumstances developed by the second trial show that they do not necessarily import a degree of certainty precluding inquiry as to their meaning, nor a degree of inflexibility preventing adjustment and understanding.

[2] Assuming that an issue may be made as to the meaning of the contract, or as to the understanding of the parties as to its meaning, it would appear that sufficient evidence was introduced to authorize submission of the issue to the jury. The Brooks-Scanlon representatives testify distinctly as to their understanding, and the understanding of the agents of the railroad company could be inferred from their conduct. The circumstance that, for a period of five years, claims were made by the lumber company and paid by the railroad company, which would accord with such meaning or understanding, would give support to the lumber company's contention. Upon the former appeal this fact was given little weight, because of the uncontroverted claim of the railroad company that the payments were by mistake, under circumstances excusing mistake. It was stated that the purchasing department of the railroad had no knowledge of the fact that the division to the Kentwood & Eastern was paid on this lumber, and that the traffic department did not know that the invoices were paid without deductions. The purchasing agent testified that, while he knew the lumber was purchased at Kentwood, he had no means of knowing whether it originated on the Kentwood & Eastern, or at points further south on the Illinois Central, and he also testified that he was not familiar with "traffic transactions."

Knowledge of a corporation may be only through individual representatives of the corporation; and, ordinarily, knowledge resulting from transactions by an agent within his authority, or acquired by

him in the conduct of such business with reference thereto, will be knowledge imputed to the corporation. But this case, in the aspect under consideration, deals with the construction placed upon a contract by the parties who made it, and an inference with reference thereto from the conduct of the parties, based upon an assumption of knowledge of pertinent facts, cannot be indulged, where the knowledge is merely imputed to the corporation, and does not actually exist in some individual representing the corporation.

Upon the former appeal, not only was there an absence of evidence of the understanding of defendants, but an absence of evidence of knowledge in any representative of the railroad company, from which an inference could be legitimately drawn that he had given a construction to the contract other than that suggested by the ordinary meaning of its terms. In passing upon such an issue, even the knowledge which the law imputes to a man (as the published tariffs) could not logically be considered.

In the case made out on the second trial there was proof that the requisite knowledge existed, or, at all events, there was sufficient evidence of such knowledge to authorize submission of the issue as to its existence to a jury. Mr. Bradley, purchasing agent of the railroad, admitted on the second trial that he had actual knowledge of the tariffs providing for the divisions—that he had knowledge of the fact that the lumber was made from logs that came from the Kentwood & Eastern and that the divisions were actually paid to the Kentwood & Eastern. He is also made to testify that he understood that defendants were to receive the specific prices named in the contracts, that there was nothing to be taken off the prices, that nothing was to be deducted, and that he understood that defendants so understood. From the remainder of his testimony it is to be inferred that the purport of the questions to which the witness gave his acquiescence was not realized, and little effect is given to that which would otherwise be conclusive. But, while these statements are not to be taken as an admission of complete knowledge, a jury would be warranted in assuming that he had, in addition to the knowledge admitted, knowledge of the facts it was his duty to know in the conduct of his work, and which he could easily have ascertained. If a jury should so believe, it would have a sufficient basis for a finding that the corporation had full knowledge of all of the facts, and that it gave a practical construction to the contract, by which it is now bound.

[3] Every shipment from Kentwood that went into Central territory involved a division and a payment by the Illinois Central to the Kentwood & Eastern Railroad. All of the officials and employés of the Illinois Central have notice of the published tariffs applicable to the shipments from Kentwood. Some of them had actual knowledge of the tariffs, of the origin of the timber, and of the destination of the lumber. It was the duty of the auditing and paying departments to know what was contracted to be paid for lumber, and what was paid. It was the duty of the purchasing department to know what was actually being paid. Under the facts disclosed, it would involve too great an assumption of carelessness, indifference, and incompetency upon

the part of the responsible agents and employés of the Illinois Central to assume, as a matter of law, that they did not know that, on shipments from Kentwood, the railroad was paying, not only the price fixed by the lumber company, but also the division to the Kentwood & Eastern. During all the period of more than five years the railroad company was paying the entire amount fixed by the contracts as the price of the lumber, and when it shipped the lumber into Central territory, it paid the additional amount required by its division with the local railroad. The transactions were very large in number and in the amounts involved. These circumstances would warrant a jury in concluding that the letters "f. o. b." were accepted by both parties as referring alone to charges connected with loading and handling the lumber at the shipping point, and as not having reference to charges conditional in their character and the existence of which resulted from subsequent action of the purchaser.

[4-7] The lumber company had the right to accept and act upon this practical construction of the contracts. It had a right to, and did, consider the payments made to it by the Kentwood & Eastern (of the divisions from the Illinois Central) in fixing the prices of the lumber. While only one price was made, whether the lumber was shipped into Central territory, or into the territory to which the division did not apply, there is evidence that the money to be received from the division was considered in fixing the price. The experience of the lumber company indicated about the percentage which was to go into the one territory and the other, and this percentage furnished a reasonable basis for the determination of the prices. Where one of the parties to a transaction has been misled to his disadvantage by the conduct of the other, based upon mistake, the circumstances being such that he had a right to assume that the other was acting with full knowledge of the facts, and it being impossible for the parties to be restored to their original condition, the party to the contract who has suffered by the mistake of the other will be protected. The lumber company, after the first contract had been practically construed, by payment of its bill without deduction of the division, was warranted in assuming that like contracts would be given a like meaning, and was warranted in giving a lower price than it would have given, if deductions had been made. The Lumber Company made its prices with reference to this practical construction of the contract. If the practical construction is not the correct construction, it was still the construction, or apparently the construction, of the railroad company, acquiesced in and acted upon by the lumber company. The prices having been fixed with reference to this practical construction, and the lumber company receiving as the price less than it would otherwise have charged, the railroad company ought not now to be permitted, by insisting upon a different construction, to retain the benefit of the reduced prices and secure the return of the sums payment of which induced the prices; or, at all events, the issue of estoppel developed by the pleadings and evidence ought to be submitted to the jury for its determination. It may be that the plea of estoppel could be applied to part only of the amount in controversy.

The correctness of the propositions made in the opinion on the first

appeal we have no occasion to question; but the defenses developed by the evidence adduced by the defendant upon the last trial of the case should have been submitted to the jury.

The judgment is reversed.

WALKER, Circuit Judge, dissents.

(257 Fed. 241)

INTERSTATE BUSINESS MEN'S ACCIDENT ASS'N v. LEWIS.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5278.

1. STIPULATIONS ⟹14(4)—CONSTRUCTION—STIPULATION OF FACTS.

Stipulation of facts, in action on accident policy, that the scarf pin used by insured in pricking pimple communicated the infection into the tissues of the lip, *held* properly construed as meaning that the pin itself was infected.

2. INSURANCE ⟹455—ACCIDENT INSURANCE—"ACCIDENTAL MEANS."

Means of death were accidental, within an accident policy, where deceased selected a scarf pin, in ignorance of its infected condition, to puncture a pimple.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accidental Means.]

3. INSURANCE ⟹146(3)—CONSTRUCTION OF POLICY—RESOLVING DOUBT.

Rule of construction that doubt should be resolved against insurer cannot be applied to a clause which is reasonably clear.

4. INSURANCE ⟹530—ACCIDENT INSURANCE—DEATH RESULTING FROM INFECTION.

Where insured punctured a pimple with an infected pin, in ignorance that pin was infected, and infection was immediately communicated and spread, whether death ensuing therefrom be ascribed to the original injury, under the doctrine of proximate cause, or whether the infection be deemed a part of the injury, the case is governed by the clause of the policy providing that whenever, as the direct result of an injury occurring solely by external, violent, and accidental means, the skin is punctured, and there is introduced into the system through the puncture, and by the same means causing the puncture, any bacteria which shall produce blood poisoning or infection, indemnity for disability or death resulting therefrom shall not exceed $500.

5. INSURANCE ⟹530—ACCIDENT POLICY—SKIN.

The definite article before the word "outer," in clause of accident policy limiting liability, relative to puncturing "the skin or the outer covering of the eye," shows the word "skin" refers to the skin of the body, and not the outer covering of the eye.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Action by Maude Lewis, executrix of John Folger Bailey, deceased, against the Interstate Business Men's Accident Association. Judgment for plaintiff, and defendant brings error. Reversed, with instructions.

R. M. Haines, of Des Moines, Iowa (Dunshee, Haines & Brody, of Des Moines, Iowa, on the brief), for plaintiff in error.

Eugene D. Perry, of Des Moines, Iowa (H. H. Stipp, R. J. Bannister, Vincent Starzinger, and H. B. Bradbury, all of Des Moines, Iowa, on the brief), for defendant in error.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. This is an action to recover a death indemnity alleged to be due and payable by the plaintiff in error, hereafter defendant, to the estate of John F. Bailey, deceased. The case was heard by the trial court, sitting without a jury, upon the pleadings and a stipulation of facts. Judgment was rendered in favor of the defendant in error, hereafter plaintiff. Section 10, article 6, of the articles of incorporation of defendant, and paragraphs 7 and 8 of the stipulation of facts, read as follows:

"Section 10. The association shall pay to the beneficiary designated in writing by any member of the accident department, who must be either the surviving wife or heir of such member, the proceeds of one assessment of $2 on each member of the accident department in good standing at the time of the accident, to an amount not exceeding $5,000, on account of the death of any member of the accident department occurring within 90 days from the happening of the accident and resulting directly and without intervening cause from a bodily injury sustained by the member while in good standing and effected solely by external, violent, and accidental means, subject only to the conditions, provisions and limitations of the by-laws."

"(7) That prior to his injury the insured, John F. Bailey, was a strong and vigorous man, actively engaged in his business, and apparently in excellent health. That on or about the 5th day of July, 1915, he discovered a small pimple on the right side of his upper lip. That upon discovering said pimple, while alone and in the absence of any eyewitness, he removed his gold scarf pin from his necktie and intentionally pricked said pimple with said scarf pin. That his lip at said place became immediately infected with staphylococci infection from the pricking of said pimple with said scarf pin. That said infection spread rapidly over the right side of his face and extended to his nose and eye. That medical treatment was received by said insured, but that his physicians were unable to arrest the spread of said infection, which resulted in basilar meningitis, due to staphylococci infection, from which the insured died on July 18, 1915.

"(8) That the physicians in attendance upon said insured would testify that, in their opinion, the death of said insured was caused by basilar meningitis resulting from the infection to his lip, caused by the pricking of the pimple on said lip, by the insured, with said scarf pin, and that, for the purpose of avoiding the expense and delay of taking depositions, it shall be taken as true that the scarf pin used by insured in pricking his lip communicated or caused the infection by being introduced into the tissues of the lip, and that the infection, so caused, proximately resulted in basilar meningitis, which was the eventual cause of death."

It is claimed that the trial court erred: (1) In concluding as matter of law that the death of the deceased was due to a bodily injury effected by external, violent, and accidental means. (2) In concluding as matter of law that the liability of the defendant was not limited to the sum of $500.

[1] The trial court interpreted the stipulation of facts above quoted as meaning that the scarf pin itself carried the infection, and as there was no evidence that the deceased knew this fact, nor could not be presumed to know it, the use of the pin thus infected was an accidental means causing death, within the meaning of section 10, article 6, above quoted.

Counsel for defendant admits that the stipulation of facts declares that the pin did carry the bacteria into the tissues of the lip of deceased,

but insists that as to whether these bacteria originated on the skin of the lip or in the pus, or were present on the pin when selected, is a fact as to which the record is silent. We are satisfied that the interpretation placed upon the stipulation of facts by the trial court is a reasonable one, and that which the parties intended. If the pin communicated the infection, as the stipulation says, the reasonable conclusion is that the pin itself must have been infected.

[2] Counsel for defendant further contends that, if the deceased selected the scarf pin in ignorance of its infected condition to use in making a voluntary puncture of the skin, this fact would not make the means of death accidental. To sustain this proposition, a distinction is sought to be drawn between the intentional selection of an instrument in ignorance of some peculiar property which it possessed, and the inadvertent selection of an instrument known to be inappropriate. The last-named situation it is admitted might be an accidental means; but in inadvertently selecting an instrument known to be inappropriate there is no intention of selecting that instrument; neither was there in the case at bar, any intention to select an infected instrument. Such refinement may be indulged in as a matter of intellectual pleasure, but in the practical adjustment of the rights of parties to an insurance contract it ought not to be given much weight. There is no evidence or finding that deceased knew as a fact that the scarf pin was infected, and we are not prepared to decide that the knowledge as to bacterial infection has been so widely diffused that the deceased was bound to know that fact. The stipulation of facts is silent upon the question; but as the trial court found in favor of the plaintiff it must have found that the deceased did not know, nor could he be presumed to know, of the presence of bacteria upon the pin.

We are therefore of the opinion that the death of deceased was due to a bodily injury effected by external, violent, and accidental means. Without citing all the authorities bearing upon the question, we cite those which clearly in our opinion sustain the position here taken. Western Commercial Travelers' Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653 (Eighth Circuit); Lewis' Executrix v. Ocean Accident & Guarantee Corp., Ltd., 224 N. Y. 18, 120 N. E. 56; Miller v. Fidelity & Casualty Co. (C. C.) 97 Fed. 836; Healey v. Northwestern Mutual Accident Ass'n, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637; United States Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; Sinclair v. Maritime Passenger Assurance Co., 3 El. & El. 478; Brintons, Ltd., v. Turvey, A. C. 230, 2 Ann. Cas. 137; H. P. Hood & Sons v. Maryland Casualty Co., 206 Mass. 226, 92 N. E. 329, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379; Railway Mail Ass'n v. Dent, 213 Fed. 981, 130 C. C. A. 387, L. R. A. 1915A, 314 (Eighth Circuit); Ætna Life Insurance Co. v. Portland Gas & Coke Co., 229 Fed. 552, 144 C. C. A. 12, L. R. A. 1916D, 1027.

The case of Lewis' Executrix v. Ocean Accidental & Guarantee Corp., Ltd., supra, is the identical case now at bar, so far as the facts are concerned. Cardozo, J., delivering the opinion of the Court of Appeals, said:

"The same thing must be true of infection caused by the puncture of a pimple. Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin, and thereby became lethal. * * * 'Probably it is true to say that in the strictest sense and dealing with the region of physical nature, there is no such thing as an accident.' Halsbury, L. C., in Brintons v. Turvey, L. R. 1905, A. C. 230, 233. But our point of view, in fixing the meaning of this contract, must not be that of the scientist. It must be that of the average man. Brintons v. Turvey, supra; Ismay v. Williamson, L. R. 1908, A. C. 437, 440. Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts."

The opinion of the trial court was cited and approved in the case last referred to. Numerous other cases could be cited, but we do not deem it necessary.

[3-5] The defendant pleaded as a defense section 2 of article 4, and section 3 of article 6, of its by-laws, which read as follows:

"Section 2. This association shall not be liable to any member of the accident department, nor to any person claiming by, through or under any certificate issued to a member, for the payment of any benefits or indemnity on account of disability or death * * * resulting from infection except as provided in section 3, of article 6, of these by-laws."

"Section 3. Whenever, as the direct result of an injury occurring solely by external, violent, and accidental means, the skin or the outer covering of the eye shall be abraded, cut or punctured, and there shall be introduced into the system through said abrasion, cut or puncture, and by the very instrument or means causing said abrasion, cut or puncture, any specific bacteria, which shall, within a period of ten days after said injury produce septicæmia, pyæmia or tetanus, or any other kind of blood poisoning or infection, the liability of the association for the payment of benefits or indemnity on account of disability, loss or death resulting therefrom shall in no case exceed the amount of five hundred dollars."

We are of the opinion that under the stipulation of facts these excerpts from the by-laws limit the recovery in this action to the sum of $500. Section 3 in our opinion covers just such a case as the one at bar. Our duty is not to make contracts, but to enforce them as made. The rule that, where an insurance contract is doubtful as to its meaning in some particular, the doubt should be resolved against the insurer, cannot be used to strike down a clause of a contract when the meaning thereof is reasonably clear. We are of the opinion that the plaintiff in this case must either recover $500 or nothing. We sustain the claim of the plaintiff that the means of death was accidental, upon the ground that the bacteria which caused the infection was upon the scarf pin, and we agree with the trial court that the result would be different if the bacteria were not on the scarf pin, but entered the wound made by it from some other source, because the deceased intentionally used the scarf pin, and the means of death would not have been accidental, except for the want of knowledge of the deceased that the pin was infected.

Several reasons are urged for the purpose of showing that the defendant can claim no benefit from section 3 above quoted:

1. It is claimed that section 2 of article 4, and section 3 of article 6, of the by-laws, when construed together, as they ought to be, simply

refer to death from infection, and that the death of deceased in the case at bar was not from infection, but from accidental means, namely, the use of an infected pin. It is true in a general sense, as we decide in this case, that the means of death were accidental; but it does not necessarily follow that death did not result from infection. On the contrary, it is stipulated that infection did cause the death of the deceased. Moreover, to sustain the contention now under consideration would render section 3 of no force or application, because no liability is incurred by defendant unless the injury or death is caused by accidental means. Therefore, the means being always accidental, there could be no injury or death from infection. In other words, by the express terms of section 3 it is to apply to injuries by accidental means, so that it would be unreasonable to construe it so as not to refer to injuries or death by accidental means, where infection causes the injury or death.

2. It is claimed that the words, "the skin or the outer covering of the eye," found in section 3, must refer to the eye alone, and not to the skin of the body. We see no reason for indulging in such a construction. The definite article "the," before the word "outer," shows that the language without doubt refers to the skin of the body and the outer covering of the eye.

It is said that the Supreme Court of Iowa in Ballagh v. Interstate Business Men's Accident Ass'n, 176 Iowa, 110, 155 N. W. 241, 157 N. W. 726, L. R. A. 1917A, 1050, decided that section 3, above mentioned, did not apply to a case of this kind. We do not understand that section 3 was pleaded as a defense in the case last cited, and therefore cannot see just how it became material to construe it. We are of the opinion that section 3 limits the liability of defendant, whether the death of deceased be ascribed to the original injury under the doctrine of proximate cause, or whether the infection be deemed a part of the injury, because said section describes exactly the case before us. It is claimed that the plaintiff was entitled to judgment on the pleadings. We do not think that this is so. We also think that, the plea of waiver or estoppel not having been made below, and the cause having been submitted under the stipulation expressly submitting the effects of section 3 upon the amount of recovery, in the event it should be held that the injury was sustained by accidental means, it is not open to the defendant in error to have the question presented in this court.

Upon the whole record, we are of the opinion that the judgment of the court below should be reversed, with instructions to enter judgment for the plaintiff in the sum of $500 and interest. No costs to be taxed in this court as against either party.

(257 Fed. 246)

LEARY et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. January 16, 1919.)

No. 1640.

1. DEPOSITS IN COURT ⟹11—DISTRIBUTION OF FUND IN COURT—CLERK'S POUNDAGE.
   Where an intervener recovers a part of a fund in court, also claimed by the United States, the clerk's poundage on the part so recovered is properly deducted therefrom.
2. PRINCIPAL AND SURETY ⟹185—RIGHTS OF SURETY IN INDEMNITY FUND.
   The right of a surety on a bail bond to recover out of an indemnity fund provided by the principal his reasonable expenses in defending a suit on the bond does not extend to costs and fees expended in defending against a supplementary proceeding by the government to collect the judgment.
3. PRINCIPAL AND SURETY ⟹185—RIGHTS OF SURETY IN INDEMNITY FUND.
   A deposit of securities to indemnify the surety on a bail bond carries an implied warranty of title, but not that the title will not be questioned, and the surety is not entitled to charge the fund with the expense of successful litigation in defending his title as against his adversary, which was adjudged owner of the securities subject to his claim, whether the litigation is conducted by himself or the depositary.
4. COSTS ⟹164(1)—ALLOWANCES ADDITIONAL TO COSTS—ATTORNEY'S FEES.
   The losing party in a litigation cannot be charged with the expenses of his adversary beyond taxable costs which may be adjudged against him.

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Suit in equity by the United States against Benjamin D. Greene and others, in which Daniel J. Leary and George Leary, administrators, intervened. From the decree, interveners appeal. Affirmed.

Aubrey E. Strode, of Amherst, Va., and J. T. Coleman, Jr., of Lynchburg, Va., for appellants.

Marion Erwin, Sp. Asst. Atty. Gen., for the United States.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. The previous course of this litigation appears in the opinions of this court and the Supreme Court on former appeals. Leary v. United States, 184 Fed. 433, 107 C. C. A. 27; Leary v. United States, 224 U. S. 567, 32 Sup. Ct. 599, 56 L. Ed. 889, Ann. Cas. 1913D, 1029; Leary v. United States, 229 Fed. 660, 144 C. C. A. 70; United States v. Leary, 245 U. S. 1, 38 Sup. Ct. 1, 62 L. Ed. 113. A brief statement will disclose the questions now to be decided.

When Greene was arrested in 1899, charged with defrauding the government, he placed in the hands of Kellogg, his attorney, certain securities, represented by the fund afterwards paid into court, to indemnify Leary, appellants' intestate, for going on his bond. The last bond signed by Leary was forfeited, Greene having absconded, and in a suit thereon the United States recovered a judgment against his estate, which was paid on July 26, 1910, amounting then, with interest and costs, to $40,802.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Meanwhile, in 1903, the United States had sued Kellogg and others for an accounting, and to have the 400 shares of Norfolk & Western stock, standing in his name on the books of that company, declared to be its property, on the ground that the same, or securities exchanged for it, had been purchased by or for Greene with moneys of the United States which he had misappropriated. The Leary estate was not made a party to this suit, but in 1908, when the testimony had been taken and the case was ready for hearing, it filed a bill of intervention, setting up the agreement of Greene through his attorney to indemnify Leary, alleging that the Norfolk & Western stock constituted the indemnity fund, and praying that it be applied accordingly. Without reciting the subsequent proceedings, it suffices to say that the decision of this court on the second appeal (229 Fed. 660, 144 C. C. A. 70), affirmed by the Supreme Court (245 U. S. 1, 38 Sup. Ct. 1, 62 L. Ed. 113), determined with finality that "the estate of Leary has established a claim to the stock in question which is superior to the claim of the United States." It remains to determine the extent of that superior claim; that is, the reimbursement to which the estate is entitled.

[1] The decree under review allows the estate only the $40,802 paid by it on July 26, 1910, with interest from that date, less the sum of $30,000 paid on account in December, 1917, when the stock was sold by consent and the proceeds brought into court, and less also a clerk's poundage fee of 1 per cent., under section 828 of the Revised Statutes (Comp. St. § 1383). The balance of the fund, less the poundage thereon, was directed to be paid to the United States.

As this statutory fee is properly exacted from the person to whom the impounded money is paid, we think it was clearly correct to deduct 1 per cent. from the amount which each party received, and we perceive no reason why the government's share should be diminished by the poundage fee on the estate's share. Besides, if poundage be an item of taxable costs, like other required payments to the clerk, and recoverable as such from the losing party, as seems to be assumed in Blake v. Hawkins (C. C.) 19 Fed. 204, its allowance to the estate in this proceeding would be in effect to charge the government with costs, which is in no case permissible.

[2] The trial court held that the indemnity contract covered the reasonable expenses, including counsel fees, incurred by the estate in defending the suit of the United States on the forfeited bond; but the record indicates that those expenses had been paid by Greene. It appears, however, that after the judgment in that suit was recovered some proceeding to compel its payment was instituted in the Surrogate's Court of New York, in which the Leary estate was then in process of administration. In resisting that proceeding the estate expended the sum of $591.46, admitted to be reasonable in amount, which it now seeks to have refunded. We deem it not doubtful that this claim was rightly disallowed. The liability of the estate was definitely established by the judgment, which was not challenged by appeal, and no good reason appears for attempting to de-

feat or delay its collection. This being so, it seems evident that the indemnity fund should not be charged with an unwarranted outlay.

We come, then, to the principal claim of appellants, rejected by the court below, namely, that the Leary estate is entitled, as against the United States, to be reimbursed for its expenses and counsel fees in prosecuting the intervention, and thereby establishing the validity and priority of its lien. The government first urges the objection, which applies also to the $591.46 above mentioned, that this claim cannot be considered because not set up in the amended petition, which, save that it prays for general relief, demands repayment only of the judgment obtained by the United States. This objection loses its force when the exact status of the litigation is taken into account. The first appeal involved merely the right of the estate to intervene, which the Supreme Court sustained, and nothing else was decided. The second appeal turned on the question whether the evidence adduced was sufficient to prove an agreement to indemnify Leary, and whether the indemnity fund was represented by the Norfolk & Western stock. On this question the trial court ruled against the estate; but it was held on appeal, as above recited, that the estate had established a claim superior to the claim of the United States. There was no determination of the scope of that claim, for occasion did not arise to construe the indemnity contract in that regard. It was therefore proper for the court below, to which the cause was remanded, to permit an amendment of the petition, or to treat it as amended, so as to include a claim which is but incident to the main demand of the intervention. We think it should be examined on the merits.

The contract of indemnity appears in certain letters which Kellogg wrote to Leary in reference to signing the bail bonds of Greene. In the first of these, under date of December 14, 1899, he specifies the securities which Greene had placed in his hands, "as indemnity to you for becoming his bondsman. * * * It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligation." And later, in May, 1901, when another bond was required, he says: "It will be necessary to renew the bail given by you for Capt. Greene, and for which I hold the security for your protection." But how can it be said that this promise of indemnity and protection includes the expenses here in dispute? Such an outlay is certainly not within the express terms of the undertaking, and in the nature of the case could not have been contemplated by the parties. As the estate's right to reimbursement rests wholly and of necessity upon Leary's want of knowledge that the government could have any claim upon the stock pledged for his security, it is impossible to assert that the expenses incurred in contesting that claim, when it was subsequently made, were intended to be covered by the indemnity agreement; and that contention of appellants may be passed without further comment.

[3] It is argued that the claim in controversy should be sustained because Greene's pledge of stock carried an implied warranty of

title, and Leary acquired the rights of an innocent purchaser for value. If both propositions be accepted, and their correctness need not be questioned, we have to consider what warranty was implied by the pledge, and whether, as the matter turned out, Leary's estate had any cause of action against Greene. It seems to be well settled that in such case the implied warranty is, not that the pledgor has good title, but that good title will be conferred on the pledgee. There is no warranty that the property pledged will not be claimed by a third party, and therefore no breach of the contract, unless such a claim be successfully asserted. The warranty implied in the sale or pledge of personal property is like the covenant of general warranty in a conveyance of real estate, which is not broken except by eviction of the grantee under a paramount title; that is to say, the pledgor's implied warranty makes him liable to the pledgee only in case the latter loses the property to a stranger who establishes a better right to it.

In 35 Cyc. 416, where numerous decisions are cited, the rule in regard to the warranty implied on a sale of personal property is thus stated:

> "A warranty of title refers only to the condition of the title at the time of the sale, and is a warranty only against a superior title, or existing incumbrances, and not that the title will not be disputed."

But Leary did not "lose the property." On the contrary, as the courts have conclusively held, he got a perfectly good title even as against the United States, with whose stolen money Greene had purchased the pledged securities. True, his title was assailed, and in defending it his estate incurred expenses of considerable amount for counsel fees and the like. But as the defense was wholly successful, and Leary's title adjudged to be superior to that of the adverse claimant, there was no breach of Greene's implied warranty of title, and consequently that warranty did not of itself make him liable for the expenses of the litigation. It follows, of course, that those expenses cannot be charged upon that share of the indemnity fund which, subject to the prior right of the Leary estate, belongs to the United States as in law the successor in interest of Greene. In short, the doctrine of implied warranty does not sustain the appellants' contention.

The further argument is advanced that in the government's suit to recover the stock Kellogg's attitude, as disclosed by his answer and otherwise, was unfriendly and even hostile to the Leary estate; that as trustee of the indemnity fund he failed to do what he should have done to assist and protect the estate; that in consequence it became necessary for the estate itself to intervene in that suit; and that therefore the estate is entitled to recover the expenses which it is alleged would have been allowed to Kellogg out of the fund if he had performed his duty. But this argument rests on an assumption which seems to us clearly erroneous. If Kellogg had from the first actively aided the estate, and in a contest in the original suit, substantially like that which actually followed the intervention, had established the validity of the Leary claim, on what theory would his expenses have been chargeable upon that part of the fund adjudged in

the same suit to belong to his adversary? In that event his expenses would have been payable from the moneys awarded to the estate, because incurred in benefiting the estate, but we are aware of no rule of law under which they could have been ordered paid out of the moneys awarded to the United States.

[4] In the last analysis the case at bar involves no unfamiliar principle. One of the parties to the controversy, the United States, claimed all the Norfolk & Western stock, now represented by the fund in court; the other party, the Leary estate, claimed the greater part of it. The courts have decided that the estate has the superior claim to such portion as will discharge the obligation incurred by Leary in becoming bondsman for Greene, and that the balance of the fund belongs to the United States. The contest has been greatly prolonged and the estate put to heavy expense. But the case is by no means exceptional in that respect. It usually happens that the successful litigant gets less in net results than is adjudged to be his due, because he must himself pay the lawyer who won his suit. The costs that can be taxed against the losing party—and none at all can be taxed against the government—are little more than nominal, and the winner is therefore out of pocket for the fees of his counsel. If this be unjust to the one found to be in the right, it is because the law gives him only the amount of his recovery and the scanty sum allowed as taxable costs. We find no authority for subjecting the defeated party to any greater liability. In Hauenstein v. Lynham, 100 U. S. 483, 491 (25 L. Ed. 628), the Supreme Court said: "It is a settled rule in this court never to allow counsel on either side to be paid out of the fund in dispute." To the same decisive effect are, among others, National Bank v. Whitney, 103 U. S. 99, 26 L. Ed. 443, 103 U. S. 104, 26 L. Ed. 561, Hobbs v. McLean, 117 U. S. 567, 582, 6 Sup. Ct. 870, 29 L. Ed. 940, Riddle v. Hudgins, 58 Fed. 490, 494, 7 C. C. A. 335, and Pike v. Cincinnati Realty Co., 179 Fed. 97, 103, 102 C. C. A. 391.

The claim for expenses here considered is clearly not within the terms of the indemnity agreement, and we are persuaded that it cannot be sustained on the theory of Greene's implied warranty of title, nor yet on the theory of subrogation to the supposed rights of Kellogg, if he, instead of the estate, had carried on the litigation. Whatever its hardship, it is simply the case of a successful suitor whom the law compels to pay his own counsel.

Affirmed.

(257 Fed. 251)

UNITED STATES v. ONE SAXON AUTOMOBILE et al.

(Circuit Court of Appeals, Fourth Circuit. January 7, 1919.)

No. 1661.

INTERNAL REVENUE ⟹42—REMOVAL OF LIQUOR TO EVADE TAX—FORFEITURE OF VEHICLE.

An automobile used in removing liquor on which the tax had not been paid, with intent to defraud the government of such tax, *held* subject to forfeiture under Rev. St. § 3450 (Comp. St. § 6352), providing for forfeiture of every "carriage or other conveyance whatsoever" used for such purpose, as against a mortgage taken by the seller of the machine who voluntarily gave possession to the purchaser, but who had no knowledge of its unlawful use.

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Proceeding by the United States for forfeiture of One Saxon Automobile. From a judgment awarding priority to the lien of W. P. Mundy, the United States brings error. Reversed.

R. E. Byrd, U. S. Atty., of Richmond, Va.

G. A. Wingfield, of Roanoke, Va. (H. T. Hall, of Roanoke, Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. The collector of internal revenue, on January 19, 1918, seized one Saxon automobile in which Sandy Hairston was transporting spirituous liquors on which the tax had not been paid. Thereafter forfeiture proceedings were instituted under the following provision of R. S. § 3450 (Comp. St. § 6352):

"Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

W. P. Mundy, the holder of notes secured by a deed of trust on the automobile, intervened, claiming that the proceeds of sale should be applied first to the satisfaction of his debt, thus raising the question whether the forfeiture displaced his lien or interest in the property. The facts were agreed on:

W. P. Mundy, a dealer, on August 10, 1917, sold the automobile to Luther A. Moore for $450, taking for the unpaid portion of the purchase money, payable in monthly installments, 13 notes, secured by a deed of trust covering the property, recorded August 20, 1917. At the

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

time of seizure by the collector, there was unpaid on the notes $190, of which $80 was overdue. By the terms of the deed of trust and under the laws of Virginia, Mundy had the right to require the trustee to seize the property and sell it in satisfaction of his debt. Hairston had borrowed the automobile from Moore, and was using it for the transportation of contraband liquor when it was seized. Mundy had not at any time information of the use of the automobile to carry contraband liquor, or of any intention so to use it. No claim was made by the purchaser, Moore.

The District Court held that the rights of Mundy under the deed of trust were unaffected by the forfeiture, and that the proceeds of sale should be first applied in satisfaction of his debt, and only the balance paid into the treasury.

No doubt has ever existed of the power of Congress to impose the penalty of forfeiture on property used to defeat the revenue laws, without respect to the guilt of the owner or his knowledge of the unlawful use. Such a statute for the raising of revenue, even when containing provisions of a highly penal nature, is still to be construed as a whole, and in a fair and reasonable manner, and not strictly in favor of a claimant. United States v. Sugar, 7 Pet. 453, 8 L. Ed. 745; United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555; United States v. Graf Distilling Co., 208 U. S. 198, 28 Sup. Ct. 264, 52 L. Ed. 452. A strong consideration against any forced construction of the statute to meet the hardship of a particular case is that the law provides for relief from the forfeiture in proper cases by an executive official, and courts should always indulge the presumption that his discretion will be wisely and justly exercised. Nevertheless, if the inference of intention to exempt from forfeiture the property of an innocent owner can be drawn by any reasonable and fair construction of the language of the statute, that construction will be adopted.

This rule of construction has been extended without dissent to protect the innocent owner of property from forfeiture, even when provided by a statute which expresses no limitation or exemption of any kind, where the property has been taken by a trespasser or a thief, or the owner has been deprived of the possession by forces of nature beyond his control. This is for the reason that no right of possession or custody can be acquired by or from a trespasser or thief, or by virtue of the forces of nature against the will of the owner. In such case, the owner of the property has never in a legal sense parted with any right of custody or possession, and hence no statute can operate against his title by reason of the use or custody or possession of the thief or trespasser, or his deprivation of it by the forces of nature. This reasoning obviously does not apply when the owner voluntarily parts with his possession and intrusts his ship or vehicle to another, for in that case the owner is charged with knowledge that the person to whom he has relinquished possession, or some one acquiring the possession from him, may so use the property as to defeat the collection of the revenue, and thus bring it under the condemnation of forfeiture. While the principle is not elaborated, this we think was the distinction in the mind of Chief Justice Marshall in Peisch v. Ware, 4 Cranch, 347, 2 L. Ed.

643. The principle was applied in holding that all previous liens on vessels are overridden by forfeiture in prize cases; the court saying, if it were otherwise, shipowners could in all cases defeat forfeiture by giving mortgages on their ships. The Hampton, 5 Wall. 372, 18 L. Ed. 659; The Battle, 6 Wall. 498, 18 L. Ed. 933; The Siren, 7 Wall. 152, 19 L. Ed. 129.

The same practical considerations apply with force to the use of automobiles in violation of the statute now before us. The enforcement of the revenue statute concerning transportation of liquor is difficult, because of the facility with which automobiles may be used for that purpose without detection. If one thus engaged in illicit transportation could protect his automobile from forfeiture on proof that the legal title was in some one else, or that some one else had a mortgage on it, the difficulty of enforcing the law would be greatly increased, and the penalty of forfeiture almost always evaded.

It seems to us the statute requiring forfeiture is explicit, leaving no room for construction. It is true that it is not violated unless the liquor is removed with intent to defraud the United States of the taxes. But, when fraud in the removal is shown, the statute provides that the conveyance used for the purpose shall be forfeited. There is no limitation or exception that the forfeiture shall depend upon proof of fraud in the owner of the conveyance or on any other condition.

This court, it is true, in United States v. Two Barrels of Whisky, 96 Fed. 479, 37 C. C. A. 518, decided in 1899, where the facts were in substance precisely the same as in this case, held in effect that the limiting words, "with intent to defraud," applied, not only to the act of transportation, but also to the use of the particular conveyance, thus making it a necessary condition of the forfeiture of any interest in the vehicle that the owner of such interest should have an intent to defraud. As reluctant as we are to overrule that decision, we can find no warrant in the statute for attaching this limitation to the use of the conveyance. The court cited in support of its conclusion United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555. An examination of that case leads irresistibly to the conclusion that it not only does not support the inference that under such a statute the innocent owner or lienor of the offending conveyance is exempt from forfeiture, but suggests exactly the opposite inference. The statute there under consideration provided as to an illicit distillery that:

> Any person "who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof," shall be fined and imprisoned. "And all distilled spirits or wines, and all stills or other apparatus, fit or intending to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, inclosures connected therewith, and used with or constituting a part of the premises; and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same," shall be forfeited to the United States. Act Feb. 8, 1875, c. 36, § 16, 18 Stat. 310 (Comp. St. § 5966).

By Rev. St. § 3305 (Comp. St. § 6085), every distiller who omits to keep books in the form prescribed by the Commissioner of Internal Revenue shall be punished by fine and imprisonment, and—

"the distillery, distilling apparatus, and the lot or tract * * * on which it stands, and all personal property on said premises used in the business there carried on, shall be forfeited to the United States."

The court held that the right, title, and interest of the innocent owner of the real estate was not forfeited by a violation of the law in conducting an illicit distillery thereon, because the statute expressly provided such forfeiture only against the right and title of persons who participated in or consented to the carrying on of a distillery. The court said that the two provisions respecting personal property and real estate each clearly defined its own restrictions, and the restriction inserted in one could not be imported into the other. With respect to the provisions for the forfeiture of personal property the court uses this language:

"In order to give it such effect as will show any reason for its insertion in the statute, it must be construed to intend, at least, that all personal property which is knowingly and voluntarily permitted by its owner to remain on any part of the premises, and which is actually used, either in the unlawful business or in any other business openly carried on upon the premises, shall be forfeited, even if he has no participation in or knowledge of the unlawful acts or intentions of the person carrying on business there, and that persons who intrust their personal property to the custody and control of another at his place of business shall take the risk of its being subject to forfeiture if he conducts, or consents to the conducting of, any business there in violation of the revenue laws, without regard to the question whether the owner of any particular article of such property is proved to have participated in or connived at any violation of those laws. The present case does not require us to go beyond this, or to consider whether the sweeping words 'all personal property' must be restricted by implication in any other respect, for instance, as to personal effects having no connection with any business, or as to property stolen or otherwise brought upon the premises without the consent of its owner."

In United States v. Brig Malek Adhel, 2 How. 210, 11 L. Ed. 239, it is said:

"It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws, and has been applied to other kindred cases, such as cases arising on embargo and nonintercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty, and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." The Palmyra, 12 Wheat. 1, 6 L. Ed. 531; Dobbin's Distillery v. United States, 96 U. S. 395, 24 L. Ed. 637.

Other cases supporting the conclusion we have reached are United States v. One Black Horse (D. C.) 129 Fed. 167; United States v. Two Horses, Fed. Cas. No. 16578; United States v. Two Mules (D. C.) 36 Fed. 84; The Frolic (D. C.) 148 Fed. 921; United States v. Two Hun-

dred and Twenty Patented Machines (D. C.) 99 Fed. 559; New England Dredging Co. v. United States, 144 Fed. 932, 75 C. C. A. 572; United States v. 246½ Barrels of Tobacco (D. C.) 103 Fed. 791.

There are a number of decisions, like United States v. 1,150½ Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231, Shawnee National Bank v. United States, 249 Fed. 583, 161 C. C. A. 509, and United States v. One Automobile (D. C.) 237 Fed. 891, in which courts have been able to find, sometimes by somewhat forced construction, such limitations on the forfeiture provided as to exempt an innocent owner or lienor. It is sufficient to say as to the statute now under consideration that such an exemption could only rest upon judicial insertion of limiting words not found in the statute.

Reversed.

(257 Fed. 255)

SALYERS et al. v. UNITED STATES, for Use of INDIANA QUARRIES CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. February 19, 1919.)

No. 5038.

1. LIMITATION OF ACTIONS ⟹180(7)—OBJECTIONS AT TRIAL—MOTION TO STRIKE.

   Objection may be taken to an amendment to a petition, on the ground that it sets up a new cause of action barred by limitation, by motion to strike claim from the record and exclude it from consideration.

2. UNITED STATES ⟹67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORK—LIMITATION OF ACTIONS.

   Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), giving persons furnishing labor or materials to a contractor for public work a right of action on the contractor's bond, creates a new liability and gives a special remedy; but the limitation of one year for bringing suit is a condition of the right conferred.

3. PLEADING ⟹248(4)—AMENDMENT—NEW CAUSE OF ACTION.

   Where plaintiff in the original petition on contractor's bond set up a claim for material furnished by him to a contractor, an amendment setting up a further claim for material furnished by another and assigned to him states a new and separate cause of action, although the amount prayed for in the original petition was large enough to cover both claims.

4. LIMITATION OF ACTIONS ⟹127(11)—DATE OF SUIT—CAUSE OF ACTION PLEADED BY AMENDMENT.

   Where plaintiff, having two causes of action, has stated but one of them in his original petition, although the amount demanded is large enough to cover both, an amendment setting up the second cause of action will not relate back to the date of the original petition, for the purpose of avoiding the bar of limitation, but will be governed by its own date.

5. UNITED STATES ⟹67(4)—BOND OF CONTRACTOR FOR PUBLIC WORK—ACTION ON BEHALF OF SUBCONTRACTOR—PLEADING.

   In an action on behalf of subcontractors on the bond of a contractor for a public building, under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), an allegation that the building was completed and accepted by the United States on a date named is a sufficient allegation of final settlement between the United States and the contractor.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 12, 1919.

6. PLEADING ⟹236(5)—AMENDMENT—DISCRETION OF COURT.
Allowance of an amendment during trial, to conform the pleadings to the proof, is discretionary with the trial court.

7. APPEAL AND ERROR ⟹110—QUESTIONS REVIEWABLE—RULING ON MOTION FOR NEW TRIAL.
Ruling on a motion for new trial is not assignable as error in the federal courts.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by the United States, for the use of the Indiana Quarries Company and others, against Isaac N. Salyers and the National Surety Company. Judgment for plaintiffs, and defendants bring error. Reversed.

J. R. Files, of Ft. Dodge, Iowa (Mitchell & Files, of Ft. Dodge, Iowa, on the brief), for plaintiffs in error.

D. M. Kelleher, of Ft. Dodge, Iowa (Henry M. Hagan, of Chicago, Ill., and B. J. Price and Clarence M. Hanson, both of Ft. Dodge, Iowa, on the brief), for defendants in error.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

BOOTH, District Judge. Action at law by the United States of America against Isaac N. Salyers and National Surety Company, commenced May 19, 1913, for the use of Indiana Quarries Company, under Act of Congress of August 13, 1894 (28 Stat. 278, c. 280), as amended by Act of February 24, 1905 (33 Stat. 811, c. 778 [Comp. St. § 6923]), requiring bonds by contractors on public buildings for the payment of labor and material. (The Quarries Company will hereafter be referred to as plaintiff.)

After the action had been commenced on behalf of the plaintiff, several parties intervened, alleging the furnishing of labor and material. By written stipulation of the parties the action was tried, in June, 1917, to the court without a jury, and resulted in judgments in favor of the plaintiff and the interveners; claim of plaintiff being reduced, however, by certain counterclaims by defendant Salyers, the contractor.

By the present writ of error it is sought to reverse the judgment in favor of plaintiff. Specifications of error relied upon are as follows:

First. Error in permitting the plaintiff to amend its petition in November, 1916, and in receiving evidence under said amendment.

The building for which the material was furnished was completed May 21, 1912, and, as stated, the action was commenced May 19, 1913, which was within the year provided by the statute. In its original petition plaintiff alleged that it had furnished certain stone to the contractors which had been used and not paid for; the value of the stone furnished was alleged to be $5,000, and the amount demanded was also $5,000. By the first amendment to the petition, filed June 20, 1916, plaintiff alleged that it had furnished to the con-

tractor stone amounting to $3,495.71, and that there was a balance due thereon of $1,736.59, for which amount judgment was demanded.

[1] The second amendment (being the one of November, 1916, and the one complained of) separated the claim of the plaintiff into two parts, or counts. In one count it was alleged that stone had been furnished by Perry-Mathews-Buskirk Stone Co. (hereinafter called the Perry Company) in the amount of $3,718.73, and that the claim of the Perry Company had been assigned to the plaintiff in November, 1910. In the second count it was alleged that stone was furnished to the contractor by the plaintiff in the amount of $606.62; and it was further alleged that there was due and owing upon both of said counts the sum of $1,736.59. Motion was made on behalf of the defendants to strike out the amendment of November, 1916, on the ground that it introduced a new cause of action. No ruling seems to have been preserved upon this motion. At the close of all the evidence, however, defendants moved to strike from the record and exclude from consideration that portion of plaintiff's claim based on assignment from the Perry Company, on the ground that said assignment, set up in said amendment, introduced a new cause of action, and that at the time of the filing of said amendment (November, 1916) the year for filing claims as fixed by the federal statute had expired, and that the filing of said amendment could not relate back to the filing of the original petition.

The method adopted by defendant in preserving its rights was appropriate. The filing of the amendment did not cut off the defense. Railway v. Wyler, 158 U. S. 285, 295, 15 Sup. Ct. 877, 39 L. Ed. 983.

[2] The contention of the plaintiff is that the amendment of November, 1916, did not set up a new cause of action, but simply restated in two counts the cause of action originally set up; one of the counts being on behalf of the plaintiff as original furnisher of material, and the other on behalf of the plaintiff as assignee of the claim of the Perry Company.

The bond required by the statute above cited performs a double function: First, to secure to the government a faithful performance on the part of the contractor; secondly, to protect persons from whom the contractor obtains labor and materials. U. S. v. Nat. Surety Co., 92 Fed. 549, 34 C. C. A. 526; U. S. v. Rundle, 100 Fed. 400, 40 C. C. A. 450. And the statute is to be liberally construed to effect the purposes within its scope. Ill. Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206; U. S. v. Lowrance, 252 Fed. 122, 164 C. C. A. 234.

But, while the statute creates a new cause of action, it does so upon the terms named in the statute.

"The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right con-

ferred and compliance with them is made essential to the assertion and benefit of the liability itself." Texas Cement Co. v. McCord, 233 U. S. 157, 162, 34 Sup. Ct. 550, 552, 58 L. Ed. 893.

Among the limitations in the statute is that of 12 months for bringing suit or filing claims. Texas Cement Co. v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893; Ill. Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609; U. S. v. Boomer, 183 Fed. 726; Baker Contract Co. v. U. S., 204 Fed. 390, 122 C. C. A. 560; Eberhart v. U. S., 204 Fed. 884, 123 C. C. A. 180. The claims of the various persons furnishing labor or material are assignable. Title Co. v. Crane Co., 219 U. S. 24, 31 Sup. Ct. 140, 55 L. Ed. 72; U. S. v. Rundle, 100 Fed. 400, 40 C. C. A. 450; Title Co. v. Puget Sound Works, 163 Fed. 168, 89 C. C. A. 618. And each claim is separate and represents a distinct cause of action. Title Co. v. Crane Co., 219 U. S. 24, 35, 31 Sup. Ct. 140, 55 L. Ed. 72; Ill. Co. v. Peeler, 240 U. S. 214, 225, 36 Sup. Ct. 321, 60 L. Ed. 609.

[3] The two claims of the plaintiff and of the Perry Company being originally distinct and representing distinct causes of action, it remains to be considered whether by the amendment to plaintiff's petition of November, 1916, a new cause of action was introduced into the petition, or whether the cause of action represented by the Perry Company claim was already included in said petition. It has been noted that the amount demanded in the original petition was $5,000, and in the first amendment to the petition this amount was changed to $1,736.59, and that the amendment of November, 1916, retained this latter amount. The last amendment to the petition, therefore, did not change the amount demanded; but this is not determinative.

The tests to determine whether two causes of action are identical are fully stated in Whalen v. Gordon, 95 Fed. 305, 313, 37 C. C. A. 70, 79. Among those tests are:

"Will the same evidence support both? And will a judgment against one bar the other?"

Applying the first test to the instant case, it is plain that to support the cause of action stated in the original petition and in the petition as first amended, in addition to the formal proof of the giving of the bond and the completion of the contract and settlement thereunder, evidence was necessary (1) that the stone supplied had been furnished to the defendant; (2) that it had been furnished by the plaintiff; (3) that it had not been paid for. To support the cause of action set up by the amendment of November, 1916, in addition to the formal proof mentioned, evidence was necessary: (1) That the stone supplied had been furnished to defendant; (2) that it had been furnished by the Perry Company; (3) that it had not been paid for; (4) that the Perry Company had assigned its claim to the plaintiff prior to the expiration of one year from the completion of the contract and "settlement"; (5) that plaintiff was still the owner of the claim. Ill. Surety Co. v. Peeler, 240 U. S. 214, 225, 36 Sup. Ct. 321, 60 L. Ed. 609. It is clear, therefore, that evidence was needed to support the cause of action set up in the amendment different from and in addition to what was needed to support the cause of action set up either in the

original petition or in the original petition as first amended. The first test above mentioned has therefore not been met. Applying the second test: If plaintiff had gone to trial upon the original petition, or upon the original petition as first amended, and had obtained judgment in whatsoever amount it could have shown itself entitled by reason of itself furnishing stone to the contractor, it is plain that such judgment would not have been a bar to a recovery by plaintiff for other stone furnished by the Perry Company, the claim for which had been assigned to plaintiff; and the reverse is also clearly true, that the recovery on the latter claim would have been no bar to recovery on the former. The second test was therefore, not met.

[4] Furthermore, the amendment of November, 1916, was not a mere amplification or expansion of what was stated in the original petition, and therefore within the scope of the decisions. Railway v. Wulf, 226 U. S. 570, 576, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; Seaboard Air Line v. Renn, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006; Friedericlisen v. Renard, 247 U. S. 207, 38 Sup. Ct. 450, 62 L. Ed. 1075; Ill. Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609; Railway v. Scala, 244 U. S. 630, 37 Sup. Ct. 654, 61 L. Ed. 1360. But the amendment set forth a new and different state of facts which constituted a different cause of action, and came within the scope of the decisions. Railway v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983; Sicard v. Davis, 6 Pet. 124, 8 L. Ed. 342; Railway v. Cox, 145 U. S. 593, 604, 12 Sup. Ct. 905, 36 L. Ed. 829; U. S. v. Dalcour, 203 U. S. 408, 423, 27 Sup. Ct. 58, 51 L. Ed. 248; Whalen v. Gordon, 95 Fed. 305, 37 C. C. A. 70, and cases cited therein; Railway v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; Lang v. Railroad Co., 198 Fed. 38, 117 C. C. A. 146; Re Louisell Lbr. Co., 209 Fed. 784, 126 C. C. A. 508.

Finally, this amendment does not effect a mere substitution of parties plaintiff, nor of change of capacity in which plaintiff seeks recovery, so as to be within the scope of the decisions. Railway v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; McDonald v. Nebraska, 101 Fed. 171, 41 C. C. A. 278; In re Griggs, 233 Fed. 243, 147 C. C. A. 249; Franklin v. Conrad Stanford Co., 137 Fed. 737, 70 C. C. A. 171. But we have here an instance where the plaintiff having two causes of action has stated but one of them in his original petition, although the amount demanded is large enough to cover both of his causes of action, and then seeks by amendment to set up facts vital to and constituting the second cause of action. An amendment setting up such new and second cause of action will not relate back to the date of the original petition, but will be governed by its own date, and if the bar of the statute of limitations or a bar to the right to maintain such new cause of action has intervened, the new cause of action must fail. Texas Cement Co. v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893; Ill. Surety Co. v. Peeler, 240 U. S. 214, 225, 36 Sup. Ct. 321, 60 L. Ed. 609; Baker Contract Co. v. U. S., 204 Fed. 391, 122 C. C. A. 560; Eberhart v. U. S., 204 Fed. 884, 123 C. C. A. 180.

Our conclusion is that the Perry Company claim was barred by the limitations in the statute before the filing of the amendment of November, 1916, and that it was error to deny the motion to strike out the evidence as to the cause of action originating in that claim.

The second specification of error relied upon reads:

"Error in permitting the witnesses Hagan and King to testify concerning the contents of the books of account of Alexander King & Co., for the reason that said testimony was incompetent, irrelevant, not the best evidence, and no proper foundation therefor had been shown."

Rule 11 of this court (188 Fed. ix, 109 C. C. A. ix) reads in part as follows:

"When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected."

Rule 24 (188 Fed. xvi, 109 C. C. A. xvi), relating to briefs, contains the same provision.

There is no compliance, and no attempt at compliance, with these rules on the part of the plaintiffs in error, either in the original assignments of error filed or in the specification of errors relied upon, set out in the brief, or in the subsequent "argument" contained in the brief. Because of this failure to comply with the rules, the second specification of error will not be considered.

[5] The third assignment of error challenges the ruling of the court that the allegations in plaintiff's petition that the work on the building was completed and the building accepted by the United States on or about the 24th day of May, 1912, was a sufficient pleading of the fact that there had been final settlement between the United States and the contractor, as required by the Act of Congress under which the action is brought. The defendant, in answer to one of the intervening petitions, admitted that settlement was made on the date alleged. Furthermore, there was introduced in evidence, without objection, a certificate, or statement, from the supervising architect as follows:

"Final settlement under the contract to which you refer was authorized May 21, 1912."

In our opinion both pleading and proof were sufficient. Ill. Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609; U. S. v. Robinson, 214 Fed. 39, 130 C. C. A. 432; Pederson v. U. S., 253 Fed. 622, 165 C. C. A. 248.

[6] The fourth assignment of error challenges the action of the trial court in allowing an amendment to the petition during the trial, and after the testimony was closed, which amendment in substance alleged that the material for which recovery was sought was furnished through Alexander King & Co. as a materialman and subcontractor, whereas in the original petition it was simply alleged that it had been furnished through Alexander King & Co. The objection of the defendant to this amendment was that the legal meaning of the original allegation was that the material was furnished by the plaintiff through Alexander King & Co. as their agents, whereas the legal meaning of

the amendment was that the material had been furnished through King & Co. as a subcontractor. The importance of this objection lay in the fact that payments in considerable amounts had been made to King & Co.; and in the legal effect of those payments. But the amendment was asked and allowed in order to conform the pleadings to the proof, and it was discretionary with the trial court to allow it.

The fifth assignment of error relates to finding of fact in regard to counterclaim of the defendant Salyers. The sixth relates to finding of fact in regard to the claims of the interveners. The seventh to a ruling of the court refusing to appoint an architect to measure the number of cubic feet of stone in the building. They have all been examined, and no reversible error found.

[7] The eighth, and last, assignment of error is that the court erred in overruling a motion for a new trial. Such ruling cannot properly be made the subject of an assignment of error.

Because of error in allowing the amendment of November, 1916, to the petition and the introduction of evidence thereunder, judgment is reversed, and a new trial ordered.

(257 Fed. 261)

PENNSYLVANIA CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2507.

1. CARRIERS ⟹38—INTERSTATE COMMERCE—REBATES.

Claims for refunds for switching charges paid on prior inbound shipments into Chicago from the West could not be granted or enlarged by a subsequently enacted tariff, and hence the joint freight tariff, effective on the Pennsylvania line January 18, 1907, was not authority for a refund on inbound shipments received prior thereto.

2. CARRIERS ⟹38—SWITCHING CHARGES—REBATES.

The Chicago Joint Minimum Switching Tariff, which became effective November 1, 1898, relating to absorption of switching charges and rebates, had no relevancy to switching charges on inbound shipments from the line of a Western road.

3. CARRIERS ⟹38—REBATES—ELKINS ACT.

Actual discrimination between shippers is not a necessary element of a violation of the Elkins Act, as amended by the Hepburn Act (U. S. Comp. St. § 8597); departure from the published rate being sufficient.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

The Pennsylvania Company was convicted for violation of the Elkins Act, as amended by the Hepburn Act, and it brings error. Affirmed.

Timothy J. Scofield, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne, of Chicago, Ill., and J. Carter Fort, for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ALSCHULER, Circuit Judge. Plaintiff in error was convicted under an indictment of five counts charging violation of section 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847), as amended by the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 586 [Comp. St. § 8597]), in which is provided:

"And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given of discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

Each of the counts sets forth shipments in 1912 by the W. H. Merritt Company, of Chicago, of cars of grain aggregating 24, on each of which plaintiff in error unlawfully gave the shipper a rebate or concession of $2. That the rebate or concession of $2 per car was in fact received by the shipper from plaintiff in error is not controverted, but is sought to be justified.

The justification for these refunds made in connection with the shipments of 1912 is asserted to be that they arose out of bills paid in the years 1900 to 1906 by the former owners of the Merritt elevator, for switching to the elevator cars of grain arriving in Chicago over Western roads, and that, under the tariff then in force, charges paid by the consignees for switching to elevators cars of grain arriving in Chicago over Western roads would by Eastern roads be absorbed in or credited upon the freight charges from the elevator to Eastern points, for like tonnage of such grain carried by such Eastern roads, on presentation to the eastbound carrier of an expense bill showing the prior payment of such a switching charge.

There was in vogue in the city of Chicago during 1912 a system or transit arrangement under which, when cars of grain came into the city from Western points, they might be switched to and unloaded into a local elevator, and upon reloading the same or similar tonnage of like grain, for shipment to an Eastern point, the shipper might, on surrender of his freight bill for the inbound shipment to Chicago, secure the lower through rate from Western point of origin of an inbound shipment to point of destination of the outbound shipment. The cars described in the several counts were shipped out in 1912 from the Merritt elevator East over plaintiff in error's railroad, and, in order to obtain the advantage of a through rate, were stated to be the shipments of certain cars of grain shortly theretofore inbound to Chicago, and switched to and unloaded into the Merritt elevator at Chicago. The through rate through Chicago was thus secured; but thereupon the shipper also presented to this carrier further claims for $2 applicable to each of such cars so shipped East, predicated upon inbound switching charges to that elevator, of $2 per car which, as stated, had been paid

from 1900 to 1906; expense bills for each of such switching charges being presented to the carrier, and the $2 per car paid accordingly to the Merritt Company. It is upon the payment to the shipper of these claims or refunds of $2 per car that the indictment is predicated.

In the published tariff in force when all or most of the cars referred to in the indictment were shipped, it is provided:

"The period of time allowed for transit privileges will be 12 months from the date of inbound carriers' freight bills. At the expiration of the time limit transit privileges shall absolutely cease and full local rates, commodity or class, shall be assessed for any movement whatsoever, both into and out of the transit point."

Under this limitation, which became effective in September, 1912, an inbound Western grain shipment, made more than one year before the date of the outbound Eastern shipment, could not be used to obtain the benefit of the through rate, and an inbound switching charge incurred more than one year prior to the outbound shipment could not in any event be lawfully rebated or paid to the shipper upon the outbound shipment being made, unless, perhaps, by virtue of some previous tariff it became a lawful claim against the outbound carrier.

[1, 2] It is contended for plaintiff in error that the obligation of the outbound carrier to absorb or refund the inbound switching charge accrued under prior tariffs wherein there was no time limit, and that claims so arising could not be affected by tariffs subsequently adopted. But we must look to the tariff in force when the inbound switching charges were incurred and paid by the consignee, to determine whether or not there then accrued any such claim for refund of switching charges, which might then or thereafter be the subject of a refund.

We are referred by plaintiff in error to the joint freight tariff effective on the Pennsylvania line January 18, 1907, as authority for these refunds. It provides:

"When tonnage in grain or any products is shipped east or south via Pennsylvania lines from elevators, mills or malt houses located as above, which is equal to the tonnage in grain obtained in cars originally switched to such elevators, mills or malt houses the inbound switching charges of the Pennsylvania Company will be considered a part of the through rate and will be refunded."

Whether or not this tariff provision would authorize the refund at any time thereafter by the carrier of eastbound shipments of switching charges paid on prior inbound shipments from the West received after the tariff provision became effective, need not be considered, since the switching charges here in question were paid in the years 1900, 1902, 1903, 1904, and 1906, all prior to the effective date of this tariff. If a subsequently adopted tariff will not abrogate or limit claims for refund which accrued prior thereto, it is equally true that such claims will not be created or enlarged by a subsequently enacted tariff. Clearly this tariff of 1907 did not give rise to refunds for switching charges which were paid from 1900 to 1906.

The only other tariff appearing in evidence which seems to be seriously put forth on behalf of plaintiff in error in justification of the

payment in 1912 of these switching charges which accrued from 6 to 12 years previously, is the Chicago Joint Minimum Switching Tariff, which became effective November 1, 1898. The part relied on reads:

"A. All freight coming from warehouses, elevators or industries located on Western roads or other foreign connections, or from their tracks, will be subject to switching charges as per their switching tariffs, in addition to current rates from Chicago.

"B. Where any Western road's switching charge is not uniform to all Eastern lines, the Eastern line to which the higher charge is made may, if it so desires, absorb the actual difference to equalize such switching charge; difference of switching shall not be equalized by cartage, nor difference in location or distances equalized by switching, nor shall difference in location or distances be equalized by the payment of cartage, nor shall payment of cartage be made in lieu of switching.

"C. Where freight originates at warehouse or industries located directly on the tracks of an Eastern line, any other Eastern line taking such freight may (excepting traffic destined to Canadian territory, for which see special circulars), if it so desires, absorb all switching charges on same; difference of switching shall not be equalized by cartage, nor difference in location or distances equalized by switching, nor shall difference in location or distances be equalized by the payment of cartage, nor shall payment of cartage be made in lieu of switching."

Paragraphs A and B clearly have no reference to a situation like that here presented. Paragraph C, which relates to freight that originates at a Chicago warehouse on an Eastern line, and the absorption of switching charges by any other Eastern line which carries the freight, applies to the switching charges from the warehouse on the line of the Eastern road on which the freight originates to the line of the other Eastern road which carries the freight East, so that there may be parity between all the Eastern roads respecting shipments from a warehouse located on any one of them. It has no relevancy to switching charges on an inbound shipment to such warehouse from the line of a Western road.

We find nothing in the tariffs shown in evidence which affords any justification of these payments of $2 per car made to the shipper in 1912.

[3] It is contended that plaintiff in error could not properly be convicted of a violation of the amended Elkins Act, because there was no evidence that the privileges accorded to this shipper were denied to any other shipper, and that therefore there was no discrimination shown. The answer is that actual discrimination between shippers is not a necessary element of a violation of the amended Elkins Act. Vandalia R. Co. v. U. S., 226 Fed. 713, 141 C. C. A. 469 (7 C. C. A.); C., St. P., M. & O. Ry. v. U. S., 162 Fed. 835, 90 C. C. A. 211 (8 C. C. A.); C. & A. Ry. v. U. S., 156 Fed. 558, 84 C. C. A. 324, 26 L. R. A. (N. S.) 551 (7 C. C. A.)

The improper allowance and payment of $2 per car by the carrier to the shipper upon these eastbound shipments is such a departure from the published rate, and such a rebate or concession granted and given by the carrier, as is denounced by the amended Elkins Act.

The judgment is affirmed.

(257 Fed. 265)

PITTSBURGH, C., C. & ST. L. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2508.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company was convicted of a violation of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [Comp. St. §§ 8597–8599]), and it brings error. Affirmed.

Timothy J. Scofield, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne, of Chicago, Ill., and J. Carter Fort, for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. This cause was tried in the District Court with No. 2507, Pennsylvania Co. v. United States, 257 Fed. 261, 168 C. C. A. 345, and the causes were here argued together. Barring the fact that the shipments and switching charges which were the subject-matter of the controversy in the respective causes were different, the controlling facts and principles are identical. What we said in our opinion filed concurrently herewith in the Pennsylvania Case is alike applicable here.

The judgment is affirmed.

(257 Fed. 265)

FEDERAL LIFE INS. CO. v. KEMP et al.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1919.)

No. 2567.

1. INSURANCE ⟹146(1)—CONSTRUCTION OF CONTRACT—ELEMENTS FOR DETERMINATION.

While the terms of an insurance policy framed by the insurer are to be construed, if ambiguous, most strongly against him, even such ambiguous provisions are to be interpreted in the light of surrounding circumstances, with regard to the evident purpose of the parties and the nature of the general undertaking of the insurer towards its policy holders, whether the insurer be a mutual or a stock company.

2. INSURANCE ⟹367(2)—CONSTRUCTION OF POLICY—SURRENDER VALUES—DEDUCTION OF INDEBTEDNESS.

Where an insurance policy provided that, in case of default by the policy holder, he might accept a cash surrender value, a paid-up life policy, or extended insurance, and at the time of default in the payment of premiums the policy holder was indebted to the insurer for more than the cash surrender value of the policy, the right of the insurer under the policy to deduct the indebtedness applied to the surrender value in terms of extended insurance, and not merely to the cash surrender value.

3. INSURANCE ⟹367(2)—CONSTRUCTION OF POLICY—"INDEBTEDNESS ON ACCOUNT OF POLICY."

Where a life insurance contract provided for a cash payment of premiums annually of 50 per cent., the remaining part of the premium to be considered an indebtedness, such indebtedness was an "indebtedness on account of the policy," within a policy provision for deduction of indebtedness from the surrender value of the policy in case of default in payment of premiums.

In Error to the District Court of the United States for the District of Indiana.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action by L. Scott Kemp and others against the Federal Life Insurance Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

James C. Jones, for plaintiff in error.

Frank C. Dailey, of Bluffton, Ind., for defendants in error.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. In an action by the children, assignees of insured, on a $10,000 twenty-payment life policy issued by a company which was reinsured by defendant, judgment was entered on a directed verdict for plaintiffs in the sum of $8,475.41, the face of the policy less the amount concededly due on a loan, plus interest. The facts are not disputed; the controversy turns on the construction of the policy and the accompanying certificate of loan, the essential portions of which are copied as an appendix hereto.

Concededly, the policy lapsed on December 31, 1910, for nonpayment of the eleventh premium, unless it was continued in force for the face amount under the extended insurance provision. The premiums were $365 annually for 20 years; pursuant to the terms of the premium loan certificate bearing even date with the policy and executed concurrently therewith, only one-half of the first ten annual premiums, $182.50 each, was paid in cash. When the eleventh premium was due, the unpaid one-half of the first ten premiums, with interest, amounted to $2,278.77. The insured died July 31, 1914. No application was made within 30 days or within 6 months after December 31, 1910, for any of the methods of settlement specified in paragraph 8 of the conditions. If the first ten premiums had been paid in full, the insured would have been entitled, at the time of default in payment of the eleventh premium, to extended insurance for 15 years and 233 days, and thus, at the time of his death in 1914, the policy would have been in force for its face amount. A like situation arises if the loan be deemed an obligation separate and distinct from the policy, and not to be deducted from the value of the extended insurance at the time of the lapse.

If, however, the surrender value at that time, whether expressed in dollars or extended insurance, is to be reduced by the amount of the then existing loan as an indebtedness on account of the policy, then, as the loan exceeded the then guaranteed cash values and loan values specified on page 3 of the policy, and also exceeded the then value of the 15 years and 233 days of extended insurance, testified to be $2,074.20, there was no value remaining for the purchase of any extended insurance.

Life insurance under such a policy as the one in question is based upon the creation out of the annual premiums of a reserve fund which at compound interest will equal the face of the policy at the expiration of a certain time, determined by certain mortality tables based upon experience. The annual premium charged is in excess of this amount; this excess provides for the expenses of the company and losses greater than those counted upon; out of any balance, dividends are paid and surpluses accumulated.

It is the reserve fund which enables the company to guarantee certain loan and cash surrender values at stated periods; and it is this same fund which enables it to offer, on a default, an extension of the insurance for definite periods without payment of further premiums. The reserve in whole or in part is used to pay a single premium for the extended term insurance, which the insured may thus purchase in lieu of surrendering the policy for cash or taking a pro rata amount of insurance, in case he is compelled to lapse the policy by his inability to keep on paying the stipulated premiums.

[1] An insurance company, like an individual, may disregard the fundamental elements of legitimate business and by contract agree to give its policy holders, or some of them, privileges which, if given to all, would inevitably result in time in insolvency; and if the contract clearly so provided, the folly of it would be no defense to its enforcement. But all contracts are to be interpreted in the light of the surrounding circumstances; and while the terms of an insurance policy, framed as they are by the insurer, are to be construed, if ambiguous, most strongly against him, yet even ambiguous provisions are to be interpreted with regard to the evident purposes of the parties and the nature of the general undertakings of the insurer towards its policy holders, and that, too, whether the insurer be a mutual or a stock company.

Even, therefore, if there were some ambiguity in the provisions of these form documents which constitute the contract, an interpretation which would necessarily result in eventually destroying the insurer and thus rendering performance of similar obligations to others impossible should not be given to it, if any other reasonable construction could fairly be given to the language used. The question in this case is: What "indebtedness on account of this policy" is embraced within that phrase as used in the cited passage from page 3 of the policy, and what "surrender value" does it reduce?

Plaintiffs contend that the loans covered by the premium loan certificate are independent of the policy and not intended to be covered by this clause; further, even if they are included therein, the "surrender value" to be reduced thereby in case of lapse is only the "cash surrender value" specified in the table on page 2 of the policy, and not the automatic alternative option of the extended insurance. Specifically, they urge that under this option the insurance, on lapse in the payment of the eleventh premium, was automatically extended for 15 years and 233 days for the face of the policy; that the unpaid half of the ten premiums constituted a loan, not enforceable directly as a debt, but only as a lien upon and payable out of proceeds of the policy on its maturity; if death occurred during this extension period, as it did occur, the face of the policy, less the loan, would then be payable; if, however, death should occur after the extension period, and when, therefore, the insurance would no longer be in force, while the company would not have to pay the insurance, it could not collect the amount loaned.

If these contentions are to be upheld, the practical result is this: That the company on December 31, 1910, had already paid out, by

way of a conditional loan, nearly the entire reserve held by it on the policy; that although it no longer had the money in hand to pay for the extended insurance for over 15 years, it was nevertheless bound to grant it practically without charge; that, if the insured outlived the 15 years, it would thus have made a gift of this insurance cost during that period, and only if he died during that period would it be repaid the loan. Such a contract, given to all policy holders, would inevitably bankrupt the company.

[2] In our judgment, these contentions are not to be upheld. Not only is a different construction of the policy consonant with sound business principles, fair and reasonable; it is, we believe, the only fair interpretation of the language, practically free of any ambiguity. The privileges accorded a defaulting policy holder are three. He may accept any one of them: The cash, paid-up policy good for life, or extended insurance good only for fixed periods, which he will be entitled to dependent upon the time of default, as specifically stated in the table of surrender values. This table is termed "Table of Loans and of Surrender Values Either in Cash, Extended or Paid-Up Assurance." While loans are necessarily cash, clearly surrender values may be cash, or a paid-up policy, or extended insurance; any of these is equally a thing of value to be given in exchange for the surrendered and defaulted policy.

What surrender value, then, is to be reduced if "an indebtedness on account of the policy" be outstanding at the time of settlement in case of default in premium? Surely whichever of the three may be selected. Concededly, if a cash surrender value were the option selected, the indebtedness would be deducted. The parties cannot reasonably be held to have intended that a paid-up policy or extended insurance could be taken in lieu of the cash, and that, in that event, the debt, which, under the loan privilege given in the table, might exceed the cash value and be nearly the entire reserve, might remain unpaid in whole or in part. The insurance, paid-up or extended, is a surrender value expressly specified as such in the table, exactly the same as the cash value. In Hay v. Meridian Life, etc., Co., 57 Ind. App. 536, 101 N. E. 651, 105 N. E. 919, the provisions were entirely unlike those in the instant case; furthermore the language was vague and ambiguous, and therefore properly interpreted in favor of the insured. Francis v. Prudential Ins. Co., 243 Pa. St. 380, 90 Atl. 205, is closer to the case in hand. While we cannot concur in the reasons given by the court for its conclusions, or in these conclusions, the case is distinguishable on the facts; for there the indebtedness was expressly stated to be deductible from the amount payable as extended insurance, not as here from the surrender value at the time of lapse, whether in cash, paid-up or extended insurance.

[3] Clearly, too, this premium loan is "an indebtedness on account of this policy." The premiums were $365 cash annually; the loan certificate, executed contemporaneously with the policy, expressly bound the maker to pay this premium in full, but only one half in cash, the other half to be secured by a lien on the policy. While the payments on the certificate were to terminate on the surrender or

expiration of the policy, the indebtedness, if any, theretofore created remained as a lien on the policy; as it was for a portion of premiums essential to have kept the policy in force, it was clearly "on account of this policy." We find no basis in the documents for limiting "an indebtedness on account of the policy" to the loans specified in the table of guaranteed loan values.

Anson v. New York Life Ins. Co., 252 Ill. 369, 96 N. E. 846, 37 L. R. A. (N. S.) 555, is not at all in point. The indebtedness there sought to be deducted was entirely extraneous; it arose out of the insured's transactions as a company agent.

The judgment must be reversed, and the cause remanded for retrial.

Appendix.

The policy provided for the payment of $10,000 "(less any indebtedness due the company on this policy)" on proof of death, while the policy was in force, "subject to the privileges and conditions stated on the second and third pages hereof, which are made a part of this contract."

The eighth paragraph of privileges and conditions, on the second page of the policy, reads as follows:

"If this policy shall become void by the violation of any stipulation or agreement, all payments made or accepted hereon shall be retained by and shall belong to the company, except that if after three full years' premiums shall have been paid on this policy, it shall cease or become void solely by the nonpayment of any premium when due, the owner will be entitled, on legal surrender of this policy within thirty days thereafter to one of the methods of settlement provided in the table upon the third page hereof at the date of surrender, as follows:

"1. Receive a paid-up life policy for the amount specified in the said table; or,

"2. Receive the amount specified in the said table as the cash value of this policy; or,

"3. Should no choice be made within said thirty days of one of the foregoing methods of settlement, and providing application is made therefor within six months from date of default of payment of premium, the owner of this policy will still be entitled to receive a certificate extending this assurance, for the face value of this policy, for the number of years and days specified in the said table, subject to the conditions regarding proofs of death specified on the face of this policy, provided that, if death occurs within three years from the date of such certificate and during the term covered by such extended assurance there will be deducted from the amount payable the amount of the premiums which would have been paid had there been no lapse."

On page 3 of the policy is a table headed "Table of Loans and of Surrender Values, Either in Cash, Extended or Paid-Up Assurance, and Additions at Death." While the table covers each year from three to twenty, only the tenth year is essential here. It reads:

At End of	Loan Values.	Cash Value.	Total Amount Payable at Death.	Extended Assurance.		Paid-up Life Policy.
				Years.	Days.	
10th Yr.	2,250.00	1,965.00	11,965.00	15	233	5,000.00

After the table on page 3, was the following:

"Any indebtedness on account of this policy outstanding at the time of settlement as provided by the terms of paragraph 8 of privileges and conditions upon the second page hereof, will correspondingly reduce the surrender value specified in the above table."

At the time the policy was issued, it was agreed that the insured might pay half of each annual premium, $182.50, in cash, and that the remaining half of the premium, with compound interest at 4 per cent., should become an indebtedness secured by a lien against the policy.

The agreement with respect to this, executed concurrently with the policy, is evidenced by the "Premium Loan Certificate" as follows:

"Premium Loan Certificate.

"Whereas, the Interstate Life Assurance Company, of Indianapolis, Indiana, has accepted an application, and issued, upon the statements contained therein, a policy of assurance upon my life in the sum of ten thousand dollars, I hold myself duly bounden to the said company in the sum of three hundred sixty-five and no/100 dollars, annually for twenty years, unless said policy be sooner terminated by death or surrender, payable upon the terms and conditions as herein provided.

"1. The true intent and purpose of this loan certificate is that I hold myself bound to pay for said policy of assurance a sum of money annually, the cash part of which shall be fifty per cent. (50%) of the premium thereon.

"2. In order that the terms and conditions of this loan certificate shall be made good, the company shall have a lien upon the policy of assurance upon my life, in payment for which it is given, to the extent of the annual differences between the cash paid and the full premiums, with four per cent. (4%) interest thereon, computed in accordance with insurance law and mathematics. In the event of the policy for which the loan certificate is given becoming a claim by death within twenty years from the date of this policy, there shall be paid thereon the profits apportioned thereto.

"3. The payments on the loan certificate shall terminate upon the surrender to the company of the policy upon which it is predicated, or at the expiration of twenty years from the date thereof.

"Signed and witnessed this 31st day of December, 1900.

"Stephen Bruce Kemp, Maker."

(257 Fed. 270)

L. P. LARSON, JR., CO. v. LAMONT, CORLISS & CO. et al.

SAME v. MINT PRODUCTS CO.

(Circuit Court of Appeals, Seventh Circuit. July 30, 1918. Rehearing Denied January 15, 1919.)

No. 2476.

1. TRADE-MARKS AND TRADE-NAMES ⟹45—REGISTRATION—EFFECT—SUBSEQUENT REGISTRATION.

Where a trade-mark for a gum wrapper, consisting of an exhibited design containing the words "Peptomint" and "Gum," was registered with an explicit disclaimer of the words "Peptomint" and "Gum," the statutory right respecting "Peptomint" as one of the elements of the trade-mark was exhausted, the trade-mark statute containing no provision for reissue or amendment after issue, and the registrant could not thereafter, by subsequent registration, acquire any right respecting the word "Peptomint."

2. TRADE-MARKS AND TRADE-NAMES ⟹45—UNFAIR COMPETITION—COMMON-LAW RIGHTS.

Where a gum manufacturer's label was marked with the word "Peptomint" wreathed with sprigs of peppermint, and the quoted word was popularly taken as corrupt spelling of peppermint, and so pronounced, the manufacturer, in attempting to assert a common-law right to the

quoted word as an independent trade-mark, could not, after disclaimer of such word in the registration of his trade-mark, claim that such word was arbitrarily coined from "peptone."

3. TRADE-MARKS AND TRADE-NAMES ⟹93(3)—UNFAIR COMPETITION—EVIDENCE.

In an action based on unfair competition by a manufacturer in using the word "Peptomint" to simulate both in color and design the word "Pep-O-Mint" on plaintiff's candy labels, evidence *held* to require a decree for plaintiff.

4. TRADE-MARKS AND TRADE-NAMES ⟹93(1)—UNFAIR COMPETITION—REGISTERED TRADE-MARKS—PRESUMPTIONS.

In an action for unfair competition in the use of the word "Peptomint" to simulate plaintiff's word "Pep-O-Mint," that plaintiff's label bore the words "trade-mark registered," while the word "Pep-O-Mint" had not been registered, did not require a dismissal of plaintiff's bill, where such words were attributable to a legend on plaintiff's products that actually had been registered, and in view of the presumption that a suitor's hands are clean.

Consolidated Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the L. P. Larson, Jr., Company against Lamont, Corliss & Co. and others, and action by the Mint Products Company against the L. P. Larson, Jr., Company, with cross-bill by defendant against plaintiff in the last-mentioned action. From a dismissal of plaintiff L. P. Larson, Jr., Company's bill and cross-bill, it appeals; the appeals being consolidated. Modified and affirmed.

Frank F. Reed and Charles H. Aldrich, both of Chicago, Ill., for appellant.

James R. Offield and Charles K. Offield, both of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. For alleged infringement of trade-mark and for alleged unfair competition appellant sued Lamont, Corliss & Co., selling agents of Mint Products Company. That company reciprocated with a like suit against appellant. In addition to taking issue by answer, appellant in a cross-bill again asserted that it was the aggrieved party. On final hearing appellant's bill against Lamont, Corliss & Co. and its cross-bill against Mint Products Company were dismissed for want of equity. With respect to Mint Products Company's bill a decree was entered that Mint Products Company was the exclusive owner of the trade-mark or name "Pep-O-Mint" and also of the word collocation and descriptive appearance of the wrapper inclosing its mint lozenges; that appellant had infringed said trade-mark or name and also had simulated said wrapper; and that appellant be enjoined—

"from engaging in unfair competition with Mint Products Company, and from putting up or selling mint lozenges under the trade name or mark 'Pep-O-Mint,' or any simulation thereof as to style of lettering or letter arrangement and design, or so wrapped in labels or contained in cartons that may be mistaken for the goods of Mint Products Company."

In 1912, appellant, after a year's business in chewing gum, registered the following trade-mark:

Appellant's verified statement alleged that the trade-mark consisted of the exhibited design and explicitly disclaimed the words "Peptomint" and "Gum."

In 1915 appellant filed a second application and thereupon procured the registration of the following trade-mark:

Appellant's verified statement alleged that the trade-mark consisted of the exhibited design and explicitly disclaimed the word "Gum." Inferentially appellant sought to assert a trade-mark right in the word "Peptomint" by saying:

"No claim is made to the word 'Mint' except in association with the word 'Pepto.' "

Appellees in 1913 began to make and sell candy lozenges, of various flavors, under the trade-mark "Life-Savers." Their lozenges were somewhat of the form of a life-buoy and were done up in cylindrical packages. Flavors were prominently marked by a peculiar style of printing, displayed along one side of the cylinders, "Pep-O-Mint," "Choc-O-Late," "Wint-O-Green," "Malt-O-Milk," "Cl-O-Ve," "Lic-O-Rice." Letters, white on a purple background, were graduated in size, the largest at the ends, the others diminishing toward the round O at the center.

In 1914 appellant notified appellees that they were infringing the trade-mark "Peptomint" by the use of "Pep-O-Mint" on their peppermint-flavored "Life-Savers." This was the first that appellees knew of appellant's claim of "Peptomint" as a trade-mark. Appellant began its suit in 1916 and counted upon the 1915 registration.

[1] In the trade-mark statute, as in the one respecting copyright, there is no provision for re-issue or amendments after issue. Consequently the 1912 registration exhausted the statutory right respecting "Peptomint" as one of the elements of the described mark. Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 30 Sup. Ct. 38, 54 L. Ed. 150. And so appellant must be held to its disclaimer.

[2] With respect to an asserted common-law right in the word "Peptomint" as an independent trade-mark, the record shows that appellant's gum was marketed in packages bearing the 1915 design in red, green and white. In so far as the word "Peptomint" was used alone, the use was oral; and appellant's own witnesses show that the printed word was popularly taken as a corrupt spelling of peppermint and was so pronounced. As the name of the flavor of appellant's gum, the word can have no standing as a common law trade-mark. And in view of the 1912 disclaimer, the common pronunciation of the word, and appellant's wreathing it with sprigs of peppermint, equity will not hear appellant now say that the word was arbitrarily coined from "peptone," a digestive aid. At all events appellant can reach the question of infringe-

ment only through the common pronunciation of the two words as peppermint. Appellees make no allusion to "peptone." All agree that "Pep-O-Mint" is peppermint.

Concerning unfair competition, appellees in marketing their candy lozenges did not in any way imitate appellant's gum labels and packages and did not attempt to palm off their goods as appellant's. They did not in any way molest appellant in its fair-trade rights, for appellant cannot be allowed trade rights in any form that would prevent appellees from marking the various flavors on their packages of "Life-Savers" as they did.

[3] In Mint Products Company case, we find that appellant has been guilty of unfair competition. In March, 1915, appellant went into the candy lozenge business. It put out peppermint lozenges in packages with red, green and white labels, which were practically identical with its "Peptomint" gum label except that the word "gum" was omitted. Of this label there was no complaint. But in December, 1915, appellant made a change. On its new label the word "Peptomint" is shown in white letters on a purple background, with the letters graduated in size to simulate "Pep-O-Mint" of Mint Products Company's label, and with the letter O elongated horizontally to give a spaced appearance. As this was after appellant had begun its warfare, the inferences are obvious. But, appellant says, no damage was done, no cause of action arose, because the record fails to show that a secondary meaning had attached to "Pep-O-Mint," indicating origin in Mint Products Company. When these candy lozenges are displayed in cartons the part having the name of the flavor is on top, so that the customer and the seller may readily pick out the flavor desired. From the evidence respecting the large amount of long continued advertising, the character of the advertising, and the volume and extent of the business, we have no difficulty in finding that the peculiar and distinctive style of marking the flavors, "Pep-O-Mint," "Wint-O-Green," and so forth, had come to indicate to purchasers that they were getting the goods put forth by Mint Products Company. If further proof were needed, it is found in appellant's deliberate appropriation.

[4] Appellant contends that the case against it must be dismissed because Mint Products Company's label bore the words "Trade-mark registered," while the record shows that "Pep-O-Mint," on which trade-mark infringement was based, had never been registered. There are two answers: First. Though a certified copy of registration was not produced, testimony was given to the effect that "Life-Savers" was a patented (registered) trade-mark. If so, the criticized legend should be attributed, as it may well be from its position on the label, to the trade-mark "Life-Savers." Second. The presumption that a suitor's hands are clean, continues until some one—the suitor himself, his adversary, or the court—shows that they are unclean.

But the decree against appellant is too broad. Mint Products Company can be allowed no exclusive ownership of the word "Pep-O-Mint" as a trade-mark. It was used to indicate the flavor of one of several kinds of "Life-Savers." What was owned was the distinctive style of wrappers and cartons, including the particular way in which the word

"Pep-O-Mint" was displayed. Further, the injunction and accounting must be limited to the proven violation, namely, the use of the label (with its accompanying cartons) put forth by appellant in December, 1915, identified as Exhibit C of the bill. Also, the general prohibition "from engaging in unfair competition with Mint Products Company" is to be deleted. To refrain from unfair competition is appellant's legal duty; but appellant should not be subjected to the possibility of contempt proceedings for undefined breaches of that duty. Swift v. United States, 196 U. S. 375, 396, 402, 25 Sup. Ct. 276, 49 L. Ed. 518.

Decree modified and affirmed.

(257 Fed. 274)

KETCHUM v. PLEASANT VALLEY COAL CO.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1919. Rehearing Denied May 26, 1919.)

No. 5103.

1. MINES AND MINERALS ⚷42—VALIDITY OF PATENT—COLLATERAL ATTACK.
   A patent to coal land, issued to an entryman who, after filing his declaratory statement, but before making entry, conveyed the land, is not void, and its validity can be questioned only by the government.
2. ESTOPPEL ⚷27(1)—COAL LAND ENTRYMAN—CONVEYANCE.
   A coal land entryman, who conveyed the same for a valuable consideration after filing his declaratory statement, but before completing his entry, and who on receiving the patent delivered it to his grantee, is estopped to deny the validity of his conveyance, and a subsequent grantee from him with notice is equally estopped.
3. ESTOPPEL ⚷47—CONVEYANCE BY ENTRYMAN OF PUBLIC LAND—SUBSEQUENT PATENT.
   A patent for coal land, issued to an entryman who has previously conveyed his right in the land, inures to the benefit of his grantee, under Comp. Laws Utah 1907, § 1979.
4. ESTOPPEL ⚷93(8)—PERMITTING IMPROVEMENTS OR EXPENDITURES.
   Possession of land by a grantee for more than 20 years, during which time it expended large sums in improvements, is a bar to a suit in equity to recover the land by adverse claimants, who had knowledge of such possession and use.

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Suit in equity by the Pleasant Valley Coal Company against Truman A. Ketchum. Decree for complainant, and defendant appeals. Affirmed.

E. A. Walton, of Salt Lake City, Utah (T. D. Walton, of Salt Lake City, Utah, on the brief), for appellant.

R. G. Lucas, of Salt Lake City, Utah (W. H. Dickson, A. C. Ellis, Jr., Waldemar Van Cott, W. D. Riter, P. T. Farnsworth, Jr., and Ferdinand Ericksen, all of Salt Lake City, Utah, on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

WADE, District Judge. By this action a decree is sought adjudging the plaintiff (in the District Court—the appellee here) to be the absolute owner of about 160 acres of coal land in Carbon county, state of Utah; and it is prayed that the appellant be barred from asserting title thereto. For clearness of statement, the parties will be designated as in the District Court, and the plaintiff—Pleasant Valley Coal Company—will be referred to as the "company."

The plaintiff in its petition based its claim for relief upon (a) the record title; (b) adverse possession; and (c) estoppel.

1. Both parties claim record title through one Marks, who, in May, 1888, filed a coal declaratory statement, which gave him the right to make entry of the land. In October, 1888, before he had made entry, he executed a deed of the land to one Williams, who purchased for the Pleasant Valley Coal Company, though this did not appear in the deed.

In March, 1889, Marks made application to make entry and to purchase said land from the government, which right was contested, but decided in favor of Marks, and on June 5, 1891, a patent issued to him, which patent he delivered to attorneys to be delivered to the company, which by conveyances, Marks to Williams (1888), Williams to Goss (1888), and Goss to the company (1892), all of which deeds were duly recorded, had acquired the record title to said property. The company had the patent recorded March 28, 1893.

The consideration for the aforesaid conveyance by Marks to Williams was "somewhere from $3,000 to $4,000" about one-half of which was paid at the time of the conveyance, and the balance of which was paid to Marks when he delivered the patent as aforesaid.

The evidence tends to show that, when Marks conveyed to Williams, it was understood that Williams was taking title for the company, and that it was agreed that Marks should proceed to procure the patent and turn it over to the company, and then receive the balance of the purchase price, which he did as aforesaid.

2. The claimed title of the defendant Ketchum also comes through Marks, who in 1913 made a quitclaim deed to one Sweet, who in 1915 executed a quitclaim deed to Ketchum. The deeds to Sweet and Ketchum being recorded, the plaintiff brought this action. Sweet, when he procured the quitclaim deed from Marks, paid him $200 and entered into a contract in writing, which recited, among other things, that—

"Whereas, the other valuable consideration mentioned in said deed was and is as follows: That the said party of the first part claimed to own, at the time of the execution of the said quitclaim deed, the lands hereinabove described; that certain other parties, including the Pleasant Valley Coal Company, a corporation, also claims to have certain right, title, and interest in and to said lands, and claims the ownership of said lands adversely to the said party of the first part, and the said party of the second part has agreed and by these presents does agree to prosecute the necessary actions against the said Pleasant Valley Coal Company and all other parties who now appear of record to claim ownership of or any right, title, or interest in and to said lands, for the purpose of quieting the title in said lands in himself under said quitclaim deed hereinbefore referred to; that said suits shall be prosecuted only as the said party of the second part is advised by counsel so to do. Said

suits shall be prosecuted diligently by said second party, and the said first party, on his part, agrees to furnish all evidence within his knowledge, for the purpose of aiding the said second party in the prosecution of said suit or suits."

It was then provided that, in case of an adjudication in favor of Sweet, the property should be sold, and Marks should have one-half the net proceeds of such sale.

An action was commenced by Sweet against the company in 1914, which he afterwards dismissed. On October 1, 1915, Sweet executed a quitclaim deed of the property to Ketchum, who paid Sweet $1,250 therefor. Ketchum also purchased for $2,500 the interest of Marks under the contract aforesaid. Ketchum had general knowledge of the claims of the company to the property, and specific knowledge by the terms of the aforesaid contract that—

"The Pleasant Valley Coal Company, a corporation, also claims to have certain right, title, and interest in and to said lands, and claims the ownership of said lands adversely to said party."

3. Ketchum, in order to avoid the effect of the deeds, Marks to Williams, and Williams to Goss, and Goss to the company, asserts that Williams, Goss, and the company were disqualified to make entry of the coal land.

[1] We do not find it necessary to decide this question. Ketchum is asserting a personal right to this property. He is not representing the government. The patent issued to Marks is not void. Under everything claimed by defendant, such patent would at most be voidable. The government alone could complain of the alleged invalidity. As was said by Justice Brewer in Hartman v. Company, 199 U. S. 335, 26 Sup. Ct. 63, 50 L. Ed. 217:

"Whether the government could challenge the conveyance we need not determine; for, if it had any right to interfere, it has not chosen to do so."

[2] Marks was qualified to make entry and receive the patent. Before doing so, however, but after making his declaratory statement, he for a valuable consideration executed a deed of said property to plaintiff's grantor. He would certainly be in no position to assert that there was fraud or illegality in the proceedings through which he acquired the patent, and his grantees are in no better position. No one will contend upon this record that the defendant has any rights as an innocent purchaser.

[3] 4. It is also claimed that inasmuch as Marks, at the time of the conveyance to Williams, had no title (the patent not having been issued to him for more than three years thereafter), no title passed to Wiliams, nor to his grantees. It may be conceded that no legal title passed at the time of the conveyance, but when Marks received his patent, and delivered it to his grantee, and received the balance of the purchase price, certainly no title still remained in him which he could assert against his grantee, who had paid him for the land, and he could not convey any greater right than he possessed—certainly not to one not an innocent purchaser for value. Furthermore, having no title when he conveyed for a full and valuable consideration, when he acquired title (by the patent), such title inured to his grantee.

The statutes of Utah expressly so provide (Comp. Laws 1907, § 1979), and the rule of the Utah statute in no manner conflicts with any statute of the United States, but is consistent with well-settled principles of equity.

We find nothing in the numerous cases cited by counsel for defendant in conflict with these conclusions. Numerous cases are cited in which the courts denied relief, but in nearly every case the contract was executory, and specific performance was sought, but here the contract (of sale Marks to Williams) was executed, not only in the original conveyance, but by subsequent ratification. The District Court in its opinion well says:

"At the time that Marks received the balance of the purchase price, and delivered the possession of the patent, and ratified and confirmed his deed theretofore given, under the decision of the Supreme Court above cited (Hartman v. Butterfield Co., 199 U. S. 335 [26 Sup. Ct. 63, 50 L. Ed. 217]), he had legal right to alienate the said premises, and neither he nor his grantee, the defendant Ketchum, after the lapse of more than 20 years, should now be permitted to undo the contract and agreement thus executed, ratified, and confirmed."

[4] 5. Not only is defendant barred by contract conveyance and ratification, but in addition thereto the record shows that the company took possession of the property about 1892 under the Marks conveyance, and has held possession ever since, paid the taxes, and erected a storehouse, trestle, coal tipple, dwellings for employés, officers' houses, offices, power house, hospital, water tank, tram line, coke ovens, railroad tracks, power lines, etc., at an expenditure of about a quarter million dollars. Churches, schoolhouses, and other public or semipublic buildings have been erected upon this land under leases from the company. During the construction of most of these improvements, Marks and his grantees have been silent; it is now too late to ask to be heard in a court of equity.

The claim that only a portion of the land has been actually occupied by these improvements is without merit.

The judgment of the District Court is affirmed.

(257 Fed. 277)

ANCHOR OIL CO. v. GRAY et al.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1919.)

No. 5177.

1. INDIANS ⟹16(3)—LANDS—LEASE BY ALLOTTEE—APPROVAL AFTER DEATH.
The authority of the Secretary of the Interior, under Act April 26, 1906, § 20, to approve and thereby to validate a lease by a full-blood Creek Indian allottee of his or her allotment, continues after his or her death.

2. INDIANS ⟹15(1)—LANDS—ALIENATION—DEATH OF ALLOTTEE.
The provision of Act May 27, 1908, § 9, that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of the said allottee's land, does not remove restrictions upon alienation by the acts of such allottee before his death, but leaves such acts subject to the same restrictions that existed while he lived.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. INDIANS ⟹15(1)—RESTRICTIONS ON ALIENATION—DEATH OF ALLOTTEE.
The provision in Act May 27, 1908, § 9, that no conveyance of any interest of any full-blood heir in such land shall be valid, unless approved by the court having jurisdiction of the settlement of the estate of the deceased allottee, is inapplicable to conveyances made by such heir before its passage and to those made by a full-blood Creek allottee.

4. INDIANS ⟹16(3)—LANDS—LEASE BY ALLOTTEE—APPROVAL AFTER DEATH—EFFECT.
Lease of allottee of the Five Indian Tribes of his lands, when approved after his death by the Secretary of the Interior, relates back to and takes effect as of the date of its execution, except as against any persons without notice, though it provides its term shall be from approval by the Secretary.

5. INDIANS ⟹16(4)—LEASE BY ALLOTTEE—INEFFECTIVE PROVISION.
Restriction on alienation by allottee of the Five Civilized Tribes of his land never being removed, provision in his lease as to what shall happen in that event never becomes effective.

6. INDIANS ⟹16(2)—STATES ⟹9—ADMISSION—REPEAL OF FORMER LAWS—INDIAN LEASES—RECORD.
Act March 1, 1907, declaring the filing in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, of a lease of an allotment of Indian land, to be constructive notice, especially in view of it being a special act, is not repealed, annulled, or modified by admission of Oklahoma to the Union, by the recordation statutes of the territory or state (Rev. Laws Okl. 1910, §§ 1154, 1155), by the Enabling Act, the Constitution, or the Schedule to the Constitution of that State.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the Anchor Oil Company against W. H. Gray and others. Decree for defendants, and plaintiff appeals. Affirmed.

George T. Brown and Courtland P. Chenault, both of Tulsa, Okl. (John B. Meserve, of Tulsa, Okl., on the brief), for appellant.

Preston C. West, of Tulsa, Okl. (A. A. Davidson, C. S. Walker, and James B. Diggs, all of Tulsa, Okl., on the brief), for appellees.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. This case involves the validity of three oil and gas mining leases of 80 acres of land—one made on December 5, 1914, by Jennie Samuels, a full-blood Creek Indian, the allottee and grantee thereof, who died on October 11, 1915. This lease was filed in the office of the United States Indian agent, now the office of the Superintendent of the Five Civilized Tribes, Union Agency, at Muskogee, Okl., on January 5, 1915, was approved by the Secretary of the Interior on October 21, 1915, and was first filed for record in the office of the county clerk or register of deeds of the county in which the land is situated on August 10, 1916. The defendants and appellees own this lease, and are in possession of and claim the right to mine the land for oil and gas thereunder.

The plaintiff and appellant, a corporation, claims a like right under two oil and gas mining leases, which it owns, of 60 and 20 acres of this land, made respectively by Feney Rogers and Lina White, full-

blood Creek Indians and the sole heirs of Jennie Samuels. These leases were approved by the county court having jurisdiction of the settlement of the estate of Jennie Samuels during the months of December, 1915, and January, 1916, and were recorded in the office of the county clerk or register of deeds of the county where the land is situated prior to August 10, 1916, when Jennie Samuels' lease was first recorded, and the lessees under the leases of Feney Rogers and Lina White had no actual notice of the lease of Jennie Samuels until after they had respectively purchased and paid value for them in good faith. The facts which have been recited were disclosed by the petition of the plaintiff, in which he prays for possession of the land, for an adjudication of the invalidity of the lease of Jennie Samuels, of the validity of the leases of her heirs, and for a recovery of damages on account of the possession and use of the land by the defendants. The court below dismissed the petition, upon the motion of the defendants, on the ground that the lease of Jennie Samuels was valid, and that the defendants' possession and their mining of the land thereunder were lawful.

[1-3] Counsel for the plaintiff assail this conclusion on the ground that the Secretary was without jurisdiction or authority to approve the lease of Jennie Samuels, a full-blood Creek Indian, after her death, and that, as his approval was not made until 10 days after she died, her lease became void. In support of this position they argue that the authority of the Secretary to approve and thereby to perfect oil and gas mining leases of their allotments by full-blood allottees of the Creek Tribe, which was granted by section 20 of the act of April 26, 1906 (34 Stat. 137, 145, c. 1876), ceased at the death of the allottee, by reason of the provision of section 9 of the act of May 27, 1908 (35 Stat. 315, c. 199):

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of the said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

But where the validity of a conveyance of land or of leases thereof is conditioned by the approval of different officers or by different restrictions at different times, the law in force at the time of the deed or lease determines the restriction upon its validity, and where at that date a specified officer is empowered to approve and validate it, that officer, or his successor in office, may lawfully do so after subsequent legislation has conditioned the validity of like conveyances or leases with the approval of a different officer or with different restrictions, and the true construction of section 9 of the act of May 27, 1908, is that it is prospective and not retrospective in effect, that it applies to conveyances and leases made after its passage and is inapplicable to those made before its enactment, and that the Secretary of the Interior had plenary authority to approve and validate the lease of Jennie Samuels after her death notwithstanding the provision of section 9 of the act of May 27, 1908. Scioto Oil Co. v. O'Hern (Okl.) 169 Pac. 483; Harris v. Bell, and authorities cited in 250 Fed. at page 214, 162 C. C. A. 345.

Counsel insist, however, that the Secretary's power to approve the lease ceased because under section 9 of the act of 1908 the death of the lessor removed all restrictions upon alienation of the land. But that removal did not change the status of Jennie Samuels' lease, did not remove the restriction upon the alienation by her, for those restrictions persisted until she died, and she could not alienate her land after her death. She had leased her land, subject only to the approval of the Secretary, and her heirs, so far as her lease was concerned, stepped into her shoes upon her death. The lease estopped them, as it did her, from revoking it or conveying the land free from it, unless the Secretary, in the exercise of his judicial discretion, refused to approve it, and, when he approved it, the estoppel became absolute upon all of them alike.

[4] The only restrictions on alienation removed by her death were the restrictions on the alienation of the rights in the land which descended to her heirs upon her death, and those rights were inferior and subject to the rights of the lessees of Jennie Samuels to the full benefit of the lease, if it was subsequently approved by the Secretary. It was so approved, and then the lease became impregnable to the attacks of the heirs and those claiming under them with notice of the conditional lease. Scioto Oil Co. v. O'Hern (Okl.) 169 Pac. 483; Almeda Oil Co. v. Kelley, 35 Okl. 525, 130 Pac. 931; Pickering v. Lomax, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716; Lykins v. McGrath, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485.

Another contention of counsel for the plaintiff is that the lease of Jennie Samuels was inferior in right to the leases of her heirs: (1) Because it did not take effect until it was approved by the Secretary, and that approval was made after the leases of her heirs had been made and had been duly approved; and (2) because the lease of Jennie Samuels itself provided that the term thereof should be ten years from the date of its approval by the Secretary of the Interior and that—

> "In event restrictions on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease."

But whether or not the lease of Jennie Samuels was inferior to the lease of her heirs depends upon the question whether or not the lessees in the latter lease had constructive notice of the former lease, a question which will be hereafter considered. There was nothing in her lease, or in the conduct of the parties to it, to indicate any bad faith or any attempt to evade the restrictions on alienation imposed by the act of Congress, and her lease was neither void nor voidable because the parties made and delivered it subject to the approval of the Secretary before the term of the lease commenced to run. Subject to that approval the parties to this lease, by the execution and delivery thereof, estopped themselves, and those claiming under them with notice of the lease, from denying, revoking, or avoiding it, when approved by the Secretary, except for fraud or mistake; and, when it was approved by the Secretary, as against the parties to it and

those claiming under them with notice, it related back to and took effect as of the date of its execution by the parties named therein. Pickering v. Lomax, 145 U. S. 310, 314, 316, 12 Sup. Ct. 860, 36 L. Ed. 716; Lomax v. Pickering, 173 U. S. 26, 27, 19 Sup. Ct. 416, 43 L. Ed. 601; Lykins v. McGrath, 184 U. S. 169, 171, 172, 22 Sup. Ct. 450, 46 L. Ed. 485.

[5] Nor is there anything in the clause of the lease regarding the removal of all restrictions to reverse or modify this result, because all restrictions on alienation of the land never were removed until the Secretary approved the lease. The death of Jennie Samuels did not remove, but perpetuated, the restriction on her alienation of her land, for, after she died, the only act which she had done by which the land could be alienated was her lease, and the alienation by that lease was so restricted that it could have effect only when approved by the Secretary. Therefore the condition on which alone the clause of the lease was to take effect never was fulfilled, and the clause never became operative. Again, if all restrictions had been removed, and if this clause had become lawful, valid, and effective, its effect by virtue of the principle of relation would have been to have estopped Jennie Samuels and her heirs and those claiming under them with notice of the conditional lease from successfully assailing it; and the result is that the lease made by Jennie Samuels on December 5, 1914, and approved by the Secretary on October 21, 1915, was lawful and valid against all parties claiming under her or her heirs with notice that she had made such a lease.

[6] Counsel for the plaintiff, however, say that, nothwithstanding all this, it is entitled to prevail in this suit because it is a bona fide purchaser for value of the leases it owns, without any notice of the lease of Jennie Samuels until after it had purchased and paid for the leases under which it asserts its right to this property. They urge that the lease made by Jennie Samuels was not filed or recorded in the office of the county clerk or register of deeds of the county in which the land was situated until after the plaintiff had made and paid for its leases, and had duly recorded them and the other evidences of its title from the heirs in the office of the county clerk. This is conceded by the defendants. But the plaintiff's petition avers that on June 5, 1915, before the leases from the heirs under which the plaintiff claims were obtained, the lease of Jennie Samuels was filed in the office of the United States Indian agent, now the office of the Superintendent of the Five Civilized Tribes, Union Agency, at Muskogee, Okl., under and pursuant to the provision of the act of Congress of March 1, 1907, which declares that "the filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice" (34 Stat. 1026, c. 2285); and the defendants contend, and the court below held, that this filing charged the plaintiff and those under whom it claims with notice of that lease. Counsel for the plaintiff argue that this provision of the act of Congress was either repealed or superseded by the admission of the state of Oklahoma into the Union, and by the provisions of the Enabling Act of

Oklahoma, of the Constitution and of the Schedule to the Constitution of that state which became effective November 16, 1907, a few months after the act of Congress of March 1, 1907. This argument presents the second question in this case, the question whether or not the Act of March 1, 1907, was still in force when the plaintiff obtained its leases.

When the act of March 1, 1907, was passed, and when the Enabling Act, the Constitution of Oklahoma, and the Schedule to it took effect, there were in force in the territory of Oklahoma, and since have remained in force in the state of Oklahoma, these provisions with reference to the execution and record of instruments relating to real estate which may be found in sections 1154 and 1155, Revised Laws of Oklahoma 1910:

"No deed, mortgage, contract, bond, lease or other instrument, relating to real estate other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided." Section 1154.

"Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors." Section 1155.

The provisions of the Enabling Act, the Constitution, and the Schedule to it invoked, together with the statutes just recited, to nullify the provision of the act of Congress in question are these: Section 1 of the Enabling Act provides:

"That nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or to affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed." 34 Statutes at Large, 267; Revised Laws of Oklahoma of 1910, p. lxxiii.

Section 21 contains this clause:

"And all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States." 34 Statutes at Large, 277, 278; Revised Laws of Oklahoma 1910, p. lxxviii.

Section 2 of the Schedule to the Constitution of Oklahoma declares that:

"All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law." Revised Laws of Oklahoma 1910, p. cxcix.

But careful study of these provisions of the statutes, of the Enabling Act, and of the Constitution of Oklahoma and its Schedule, and a comparison of them with that part of the act of Congress of March 1, 1907, which declares that the filing of a lease with the Indian agent

shall be deemed constructive notice, fails to convince that they either have or were intended to have the effect of repealing or superseding that provision. In the first place, none of them expressly or by the plain meaning of its terms repeals or modifies it or limits its effect, and the legal presumption from this fact is that neither the United States nor the state intended so to do. In the second place, the subject-matter of the Indians, their lands, the allotment and distribution of those lands to the Indians in severalty, the leases, sales, deeds, and disposition by the allottees of their lands, the restrictions upon their alienation thereof, the extent of the rights and privileges of their lessees and claimants to this land, were and had been for more than a century within the exclusive jurisdiction of the United States and beyond the jurisdiction of the states, except in cases where the United States had renounced or released its control, and the legal presumption, evidenced and sustained by section 1 of the Enabling Act, was and is that nation and state alike intended to maintain that relation and situation wherever they have not by the plain terms of their legislation disclosed a contrary purpose. And no legislation or action exhibiting such a purpose is perceived in the statutes, the Enabling Act, the Constitution or the Schedule, to which reference has been made.

Again, the portion of the act of the United States of 1907 relating to the constructive notice given to subsequent purchasers and others, by the filing with the Indian agent of a lease of an allotment of Indian land, was special legislation, limited in its terms and effect to a single subject, leases of Indian lands, and to a particular class of persons, those affected by such leases, while the statutes of Oklahoma upon this subject of the constructive notice resulting from the recordation of instruments relating to real estate were general in their nature, treating of all classes of such instruments and of all classes of persons affected thereby. It is a cardinal rule of the construction of statutes that specific legislation in relation to a particular class or subject is not affected by general legislation in regard to many classes or subjects, of which that covered by the specific legislation is one, unless it clearly appears that the general legislation is so repugnant to the special legislation that the legislators must be presumed to have intended thereby to modify or repeal it; but the special and the general legislation must stand together, the former as the law of the particular class or subject, and the latter as the general law upon other subjects or classes within its terms. State v. Stoll, 17 Wall. 425, 436, 21 L. Ed. 650; Washington v. Miller, 235 U. S. 422, 427, 428, 35 Sup. Ct. 119, 59 L. Ed. 295; Harris v. Bell, 250 Fed. 209, 216, 162 C. C. A. 345; Stoneberg v. Morgan, 246 Fed. 98, 101, 158 C. C. A. 324; Sweet v. United States, 228 Fed. 421, 427, 143 C. C. A. 3; Priddy v. Thompson, 204 Fed. 955, 958, 959, 123 C. C. A. 277, 280, 281; Christie Street Commission Co. v. United States, 136 Fed. 326, 333, 69 C. C. A. 464, 471. If the portion of the act of March 1, 1907, relating to the constructive notice resulting from the filing of a lease of an allotment of Indian land, and the provisions of sections 1154 and 1155 of the Revised Statutes of Oklahoma of 1910 had been

enacted by a legislative body of the same state, they might have stood and have been enforced together under this rule. By so much the more should they and must they so stand and be enforced, now that the one is the act of the nation, which has general and exclusive jurisdiction of the subject and class of which it treats, and the others are the acts of the state, which has jurisdiction over all similar subjects and classes, but none over this one.

In the opinion of this court the portion of the act of March 1, 1907, which relates to the constructive notice given to subsequent purchasers and others by the filing of a lease made by an allottee of an allotment of Indian land made by the United States, was neither repealed, annulled, nor modified by the subsequent admission of Oklahoma into the Union, by the recordation statutes of the territory or state found in Revised Laws of Oklahoma of 1910, §§ 1154 and 1155, by the Enabling Act, the Constitution, or the Schedule to the Constitution of that state. And if upon an independent investigation of the questions in this case any doubt had remained, the clear, concise, and conclusive opinion of the Supreme Court of Oklahoma in Scioto Oil Co. v. O'Hern, 169 Pac. 483 would have dispelled it.

Let the decree below be affirmed, with costs against the appellant.

(257 Fed. 284)

RAYMER v. NETHERWOOD.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2666.

APPEAL AND ERROR ⚷273(11)—MATTERS REVIEWABLE—EXCEPTIONS.

Because of the dual functions of the trial judge sitting without a jury, to determine whether there is any substantial evidence to support one or the other party, and, if there is, then, whether it preponderates on one or the other side, the request or motion to adjudge either all the issues or some specific issues in favor of the requesting party or against the adverse party, to be reviewable, must make apparent that it is based specifically on the ground that there is no substantial evidence to sustain any other conclusion.

Evans, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Wisconsin.

Action by Harry C. Netherwood against Charles W. Raymer. There was a judgment for plaintiff (253 Fed. 515), and defendant brings error. Affirmed.

Burr W. Jones, of Madison, Wis., for plaintiff in error.

John B. Sanborn, of Madison, Wis., for defendant in error.

Before BAKER, MACK, and EVANS, Circuit Judges.

MACK, Circuit Judge. A review of this case is challenged on the ground that no question of law is presented to us.

The case was tried under a stipulation waiving a jury. At the conclusion of the evidence, defendant requested numerous findings of

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⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

evidentiary facts, and the conclusion of law therefrom that no contract had been consummated between the parties, and that the action should be dismissed. To the refusal to grant these requests, and to the findings of a contract, the breach thereof, and that plaintiff was entitled to judgment, defendant excepted.

In Streeter v. Sanitary District of Chicago, 133 Fed. 124, 66 C. C. A. 190, Judge Jenkins carefully defined the reviewing power of this court. Expressions used in other opinions have, however, caused some uncertainty as to the proper method of securing such a review. The confusion is apparently due to the failure to discriminate between the several functions of the trial judge, and to make clear on the record the exact questions presented to him by motions or requests.

In a jury trial, under modern practice, a motion or request for a directed verdict challenges the right of the opponent to recover, on the ground that there is no substantial evidence which would support a verdict in his favor. The correctness of the ruling thereon, if excepted to, presents a question reviewable on writ of error. Clearly the like question, arising on trial without a jury, is reviewable, if in some way it be made clear that a similar ruling has been requested. A request or motion, whether for special or general findings, or, if by defendant, for a dismissal of the action, and an exception to the refusal thereof, or an exception to the findings in favor of an opponent, is not, however, sufficient to raise the question. Such a request, motion, or exception, without more, is the proper method of invoking or challenging the jury-supplanting function of the trial judge, to determine whether one or the other side is sustained by a preponderance of the evidence, a determination not reviewable on writ of error in a federal appellate tribunal.

Because of the dual function of the trial judge, sitting without a jury, to determine both whether there is any substantial evidence to support one or the other party and also, if there is, then whether it preponderates on one or the other side, the request or motion to adjudge either all the issues or some specific issues in favor of the requesting party or against the adverse party, to be reviewable, must make apparent that it is based specifically upon the first of these grounds, namely, that there is no substantial evidence to sustain any other conclusion. Then, and then only, as Judge Sanborn has clearly pointed out in Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622 (8th C. C. A.), may the refusal of the trial judge to grant the request, if excepted to, be reviewed.

In the instant case, no such specific ground for the requested findings and motion was alleged.

Judgment affirmed.

EVANS, Circuit Judge (dissenting). The extent to which the holding goes in this case may be gathered only from a statement of the facts.

Plaintiff brought this action for damages for alleged breach of contract. The contract, if any, grew out of two letters, one, written by defendant in California, which may well be called the offer; the other, written by plaintiff at Madison, Wis., and termed the acceptance.

Whether the second letter was an acceptance of the offer found in the first was the sole disputed issue in the case. No question of fact, but simply one of law, was involved. Had a jury been drawn, the District Court, in disposing of the action, would have been compelled to direct a verdict.

Under these circumstances, it seems to me, it was the duty, as well as the privilege, of counsel to avoid the expense to litigants and to the government incident to a jury trial. On the other hand, the litigants' right to review the decision of the District Court should be as clear and as extensive as in case the idle formality of calling a jury was respected.

In either case any adverse ruling in the course of the trial, to which exception was taken, should be subject to review upon writ of error. Section 649 R. S., section 1587, Comp. Stat., did not take from the litigants the right to review the rulings of the lower court. This section was intended to give litigants the right to waive jury trials in law actions, and to give to the findings of the court the force of a verdict of a jury. Rulings on questions of law, properly presented, were subject to review in such a trial, the same as in a case of a trial by jury.

Had a jury been present, a motion to direct a verdict in defendant's favor would have saved the question here sought to be reviewed. Without the jury, a motion to dismiss should, I think, preserve the same right.

In the instant case, attorneys for plaintiff in error, following the Wisconsin state court practice, presented proposed findings of fact and conclusions of law. Their presentation constituted a request so to find. Defendant's attorneys did likewise. It was not a case where the court declined to make findings, but a case where the court, with proposed findings and conclusions from both sides, all bearing on the single disputed issue heretofore stated, adopted the proposed or requested findings of plaintiff. To this ruling, as well as to the court's failure to adopt its requested findings, defendant duly and seasonably excepted.

But defendant did more than merely request the court to make findings of facts and conclusions of law. At the conclusion of defendant's request the following appears:

> "That the court find that no contract was consummated between the parties, and that the action should be dismissed, with costs in favor of defendant."

Was not this a motion to dismiss? Certainly its equivalent. Whether counsel moves the court or requests the court to dismiss an action is quite immaterial. No deception occurs in either case. The court must have understood, and opposing counsel understood, defendant's position. He was demanding a dismissal of the action. Refusal to grant the request, motion, demand, or what it may be called, made with other requests or alone, should certainly, and I think does, raise a ruling in the course of the trial, the correctness of which may be reviewed by an appellate court. See generally, upon this proposition, United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan., 145 Fed. 144, 151, 76 C. C. A. 114; Felker

v. First Nat. Bank of Cincinnati, Ohio, 196 Fed. 200, 202, 116 C. C. A. 32; Humphreys v. Third Nat. Bank of Cincinnati, 75 Fed. 852, 21 C. C. A. 538; United States v. Robertson, 183 Fed. 711, 106 C. C. A. 149; Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622; Meyer & Chapman State Bank v. First National Bank of Cody, 248 Fed. 679, 681, 160 C. C. A. 579.

I therefore dissent from the opinion of the majority of the court.

(257 Fed. 287)

CONSOLIDATION COAL CO. v. MARCUM.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3163.

1. MASTER AND SERVANT ⟹286(19), 289(1)—ACTION FOR INJURY TO SERVANT—QUESTION FOR JURY.

Issues of negligence and contributory negligence, in an action by a coal miner against the employer for personal injury, *held* properly submitted to the jury.

2. MASTER AND SERVANT ⟹146—RULES OF MINING COMPANY—WAIVER.

A rule of a mining company, requiring operators of cutting machines to sound the roof of their working place before beginning work, and to prop it if evidence of weakness is found, may be waived by the company by employing a separate force to prepare safe places for the machines to work.

In Error to the District Court of the United States for the Eastern District of Kentucky.

Action at law by L. A. Marcum against the Consolidation Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ed. C. O'Rear, of Frankfort, Ky., for plaintiff in error.

John W. Woods, of Ashland, Ky., for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

WARRINGTON, Circuit Judge. Marcum recovered verdict and judgment against the coal company for personal injuries sustained while operating a coal-cutting machine for the company in one of its mines. Reversal is sought because of refusal to direct a verdict at the close of the testimony. Thus the only question for decision is whether the evidence was sufficient to justify submission of the cause to the jury.

[1] The injury occurred April 15, 1914, at Van Lear, Ky., in room 12 of mine 153, and was caused by the fall of a portion of the roof. The height of the room was between 4½ and 5 feet, and, according to plaintiff's testimony, the room was 22 feet wide and 250 feet long. The testimony substantially shows that the material of the roof was slate, though several witnesses say it was sandstone. The room was opened by mining and removing the coal probably a year prior to the injury, and the roof was meanwhile supported by numerous posts. The effect of this exposure to the air was to weaken the roof.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Under these conditions the company determined to make further removal of coal from one side of the room. Plaintiff and his assistant, who were operating a Sullivan electric-driven short-wall coal-cutting machine in another portion of the mine, were directed by the foreman and assistant foreman of the company to remove the machine to room 12 and to proceed with the cutting of coal. Some delay intervened, because the room had not been placed in suitable condition for such work. The company had in its employ another set of men who under direction of the foreman and assistant foreman were required, for example, to put a room of this kind in proper condition for the cutting of coal by a power-driven machine, and the company through its assistant foreman and the men used for that purpose undertook so to prepare room 12. This involved cleaning the room, removing props, and, if necessary, substituting other means of supporting the roof in order to furnish sufficient space and to make the place reasonably safe for bringing in and operating the coal-cutting machine.

Plaintiff and his assistant, however, were not satisfied that the place had been put in fit condition. The company caused further work to be done in the room; and there is testimony tending to show that its assistant foreman, Carmack, then told plaintiff the room was "in condition to cut," "in good shape," and peremptorily ordered him to do the work or leave the employ of the company. Plaintiff and his assistant then examined the room themselves, including sounding the roof, and became satisfied, though plaintiff testifies that he did not make as careful an examination as he would have made if he "had not had assurance from the (assistant) foreman that it was in a safe condition and had been fixed"; and relying, as he further in effect testifies, on Carmack's representation and yielding to the peremptory order, plaintiff with his assistant took the machine into the room and began to cut the coal. They continued the work between 20 and 30 minutes, driving the cutter into the coal about 5 feet and along its face from 8 to 12 feet, when plaintiff received his injury.

The pleadings present issues of negligence of the defendant and contributory negligence of the plaintiff, and thus involve the relative duties of the parties. The rule in a case like this is that a primary and nondelegable duty rests upon the employer to exercise reasonable care in furnishing the employé with a reasonably safe place to work. Dasher v. Hocking Mining Co., 212 Fed. 628, 631, 632, 129 C. C. A. 164 (C. C. A. 6). True, as the decision states, there are certain exceptions to the rule; and an exception is here urged under a claim that a custom existed at this mine which imposed the duty on the plaintiff himself to make the place safe, and, further, that the character of the work was such that its progress wrought changes in the condition of the place. The custom so claimed is inconsistent with the company's maintenance of a separate force of men, under direction of its foreman and assistant foreman, to prepare places of the kind in question for the work of coal cutting, and also with what the company actually did through these agencies toward placing room 12 in fit condition for the work. Besides, there is conflict in the testimony as to the existence of such a custom, and also as to causing any material change in the condition of the room either by installing the machine or by the

negligible time of operation and amount of work done prior to the injury. The most then that can be said of the exceptions relied on is that they presented questions of fact.

[2] Reliance, moreover, is placed upon a rule of the company:

"Machine runners and their helpers are instructed to carefully sound the roof of their working place before beginning work, and if any evidence of weakness is found in the roof, extra props must be set on each side of the machine and continued across the face of the room as the machine board is moved."

Marcum did not remember to have read the rule. Whether the rule was known to him or not, it happened that the examination he made of room 12 before bringing in the machine was in practical effect a compliance with the terms of the rule, so far as it can be applicable to this case. Both plaintiff and his assistant, as we have already said, sounded the roof of the room before beginning their work and without finding evidence of weakness. The rule does not require machine runners and helpers to put in place extra props, unless "evidence of weakness is found in the roof." Furthermore, the practice of the company to undertake through other agencies to provide safe places to work would indicate, and such seems to be the effect of the testimony, that it had not enforced nor relied on, but rather had waived the rule. As was said in Eagle Coal Co. v. Patrick, Administrator, 161 Ky. 333, 337, 170 S. W. 960, 962:

"Rules may be abrogated by failure to enforce obedience thereto, or they may be waived by the mine operator departing therefrom in the conduct of the operation."

There is testimony, however, tending to show that before plaintiff entered upon the work the company knew the roof was unsafe. Thus, according to some of the testimony, while the men regularly used for the purpose were engaged in removing props from room 12 and otherwise preparing it for the work of this coal cutting, they discovered several cracks in the roof and near the portion which subsequently fell upon plaintiff; they discussed the advisability of using a "header" or "cross-bar" to support this portion of the roof; apparently the plan would have been adopted if the necessary timber had been at hand; it was 250 feet away and a mule was available for drawing it to the place. A header consists of timber from 4 to 6 inches square and from 10 to 12 feet in length; it is placed across the weak portion of a roof, and an upright post is wedged under each end to sustain it; and thus space is obtained for operating the coal-cutting machine. In denying the motion for new trial, Judge Cochran said of the failure to provide headers:

"It seems to me that the situation called for the roof being supported by headers, and that it was gross carelessness not to so support it."

The charge of the court was clear and comprehensive; this is true also of the opinion rendered in denying the motion; and while we recognize the force of the learned counsel's argument for reversal, we cannot think the conclusion reached below can rightfully be disturbed.

Judgment affirmed, with costs.

(257 Fed. 290)

ROSS v. SCHOOLEY.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2603.

1. STATUTES ⟹208, 211, 221—CONSTRUCTION—INTENT.
   If a legislative intent can unmistakably be gathered from title, context, and common knowledge, it is as much a part of the act as if it were written out in the clearest words.
2. MASTER AND SERVANT ⟹111(1)—FEDERAL SAFETY APPLIANCE ACT.
   In the Safety Appliance Act (Comp. St. §§ 8605, 8613, 8617) it is implied that a railroad is liable in a private suit for an employé's injury or death resulting from a violation thereof.
3. NEGLIGENCE ⟹6—VIOLATION OF STATUTE.
   Every person for whose protection a statute sets up a particular standard of conduct is entitled to compensation for damages suffered through violation of that statute.
4. COMMERCE ⟹8(6), 27(5)—FEDERAL SAFETY APPLIANCE ACT—EFFECT OF STATE COMPENSATION ACTS.
   Inasmuch as Congress has created the liability for damages for injuries or death resulting from violation of the Safety Appliance Act (Comp. St. §§ 8605, 8613, 8617), no state Legislature can alter or impair the federal right by passing compensation acts, and an injured employé is entitled to recover under the Safety Appliance Act, although at the moment of the injury he was not engaged in interstate commerce; the congressional power called into play being the power to prescribe the equipment of interstate carriers for protection of all persons upon such roads, regardless of their participation in interstate commerce.

In Error to the District Court of the United States for the Eastern District of Illinois.

Action by Pearl I. Schooley, administratrix of the estate of Otto Schooley, deceased, against Walter L. Ross, as receiver of the Toledo, St. Louis & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari denied 249 U. S. 615, 39 Sup. Ct. 390, 63 L. Ed. ——.

C. E. Pope, of East St. Louis, Ill., for plaintiff in error.

David K. Tone and Morse Ives, both of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Schooley, a brakeman on plaintiff in error's interstate railroad, met his death in Illinois by reason of defective couplers. Defendant in error recovered judgment for damages on account of the violation of the federal Safety Appliance Act. U. S. Comp. Stat. §§ 8605, 8613, 8617.

Because defendant in error omitted to aver and prove that decedent at the time of his injury was engaged in interstate commerce, the contention is made that the exclusive right and remedy are under the Illinois Workmen's Compensation Act, which was in force at the time of the accident. Hurd's Ill. Rev. Stat. 1916, c. 48.

If the accident had occurred while decedent was working in inter-

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state commerce, plaintiff in error admits that the administratrix could have recovered for the violation of the Safety Appliance Act by reason of the express declarations of the federal Employers' Liability Act. U. S. Comp. Stat. § 8657.

[1] The pole star of statutory construction is the legislative intent. If a legislative intent can unmistakably be gathered from title, text, context, and the background of common knowledge, it is as much a part of the act as if it were all written out in the clearest words.

[2, 3] Liability to private suit for resulting injury or death is expressly declared in the Employers' Liability Act. In the Safety Appliance Act it is implied from the known frightful loss of lives and limbs due to the old link-and-pin couplings and defective automatic couplers; from the purpose stated in the title "to promote the safety of employés and travelers"; from the effect of the payment of damages as a spur to observance; from the direction to courts contained in section 8 of the act of 1893 (Comp. St. § 8612) that an injured employé "shall not be deemed to have assumed the risk"; from the proviso in section 4 of the supplemental act of 1910 (Comp. St. § 8621) in relation to "liability in any remedial action for the death or injury of any railroad employé"; and especially from the premise that the legislators had in mind the immemorial rule that every person for whose protection a statute sets up a particular standard of conduct is entitled to compensation for damages suffered through violation of that statute.

Under the Employers' Liability Act there is no need to count upon any state statute creating a liability for wrongful death, because that liability was expressly stated by the Congress. Inasmuch as the same legislative intent respecting liability is found in the Safety Appliance Act, the same result follows.

Recovery for wrongful death under the Employers' Liability Act is for the benefit of the next of kin, but the action can be brought only by the administrator; and as there is no federal machinery for appointing administrators, resort in that respect must be had to state business. But that necessity is of no greater consequence under the Safety Appliance Act.

[4] Inasmuch as the Congress has created the liability for damages for injury or death resulting from violation of the Safety Appliance Act, no state Legislature can alter or impair the federal right by passing compensation acts.

It is immaterial whether the injured employé was at the moment engaged in interstate or intrastate commerce, because the congressional power that was called into play was the power to prescribe the equipment of interstate carriers for the protection of all persons upon such roads, both employés and travelers, regardless of their participation in interstate commerce. A state Legislature, therefore, has no more power to curtail the federal right of an employé than of a traveler.

What effect a state compensation law has upon the right under the Safety Appliance Act of an employé, who was injured through defective appliances while coupling intrastate cars on an interstate railroad, has not been directly involved in any case in the Supreme Court cited by counsel or found by us. But our conclusion, which rejects a result

that would make the operativeness of the act dependent upon the legislative wills of the several states, and which aligns that act with the Employers' Liability Act in substantive and procedural effect, is supported by our understanding of Schlemmer v. Buffalo, etc., Ry. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; St. Louis, etc., Ry. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; Delk v. St. Louis, etc., Ry. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590; North Carolina Ry. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; Southern Ry. Co. v. R. R. Com. Ind., 236 U. S. 439, 35 Sup. Ct. 304, 59 L. Ed. 661; Texas, etc., Ry. Co. v. Rigsby, 241 U. S. 33, 33 Sup. Ct. 482, 60 L. Ed. 874; New York, etc., Ry. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139. And we find nothing in Minneapolis, etc., Ry. Co. v. Popplar, 237 U. S. 369, 35 Sup. Ct. 609, 59 L. Ed. 1000; New York, etc., Ry. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; or Louisville & Nashville R. R. Co. v. Layton, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931, cited by plaintiff in error, that constrains us to a different conclusion.

The judgment is affirmed.

(257 Fed. 292)

BANK OF COMMERCE & SAVINGS v. MATTHEWS.

In re MATTHEWS.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1919. Rehearing Denied March 4, 1919.)

No. 2657.

1. BANKRUPTCY ⟹407(5)—DISCHARGE—MONEY OBTAINED BY MEANS OF A MATERIAL FALSE STATEMENT IN WRITING.

Credit extended to a bankrupt by a bank through its cashier, who knew that the bankrupt was then insolvent, and who was acting solely in his own and the bankrupt's interest, was fraudulent and voidable, and the bank was not bound by its cashier's fraud, and could claim that the money was obtained by means of a material false statement in writing as to money not checked out, where the directors of the bank examined note signed by bankrupt and false financial statement attached thereto, and, relying thereupon, approved the loan.

2. BANKRUPTCY ⟹468—QUESTIONS OF FACT—REMANDING CASE.

On appeal from an order discharging a bankrupt over an objection that the bankrupt had obtained money by means of a materially false statement in writing, where it was found that the master had erred in finding that the false statement was not relied upon by the bank in extending the credit, and it appeared the master had made no finding as to whether the statement in writing was known to be false by the bankrupt, a finding by the trial judge from the printed record that the bankrupt did not read the statement or know its contents will not be allowed to stand, and the order of discharge will be reversed, so that the uncontradicted testimony of the bankrupt to such effect can be heard and its truth decided upon an observation of the witness, as well as upon his testimony.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Eastern District of Illinois.

In the matter of Walter S. Matthews, bankrupt. From an order discharging the bankrupt, the Bank of Commerce & Savings appeals. Reversed and remanded.

Charles R. Brown, of Chicago, Ill., for appellant.

A. B. Dennis, of Danville, Ill., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

MACK, Circuit Judge. Discharge was granted appellee over appellant's objection alleging in substance that he had obtained certain money by means of a materially false statement in writing made by him to it for the purpose of obtaining the credit from it.

The special master, finding that the statement was not relied upon by the bank in extending the credit, recommended for this reason that the objection be overruled and the discharge granted. The District Judge, in approving the report and granting the discharge, based his conclusions upon his finding from the evidence that the bankrupt did not read the statement or know its contents, that he relied entirely upon the bank cashier to prepare a correct statement, and that, while the statement was untrue, the bankrupt had no intention of signing the false statement.

The undisputed facts as disclosed by the record are that the bank cashier, who, some time after the loan was made, absconded, had been the bankrupt's financial agent and was better acquainted with his affairs than the bankrupt himself. He alone acted, so far as the bank was concerned, in the granting of the loan. No one else was consulted. While the loan was made on a note of $5,000 signed by the bankrupt, only $1,500 of it was intended for or inured to the latter's benefit. The other $3,500 went to the cashier. The cashier prepared the financial statement which he had the bankrupt sign at the time that the $5,000 note was signed, telling him that it was a mere matter of form and that he himself would put up bank stock as collateral.

The bankrupt testified that he had not read the statement, did not know its contents, acted entirely and completely in reliance upon the cashier (whose real character at that time had not been discovered), and that, if he had known the contents of the statement, he would not have signed it.

[1] 1. If the money had been paid out at the time the note was executed, the conclusion of the special master that the loan was not made in reliance upon the statement would be sound. But the money was not then paid; the bank merely extended a credit to the bankrupt on its books. This credit, thus obtained through the cashier, who knew that the bankrupt was then insolvent, and who was acting solely in his own and the bankrupt's interest, was fraudulent and voidable. The bank under these circumstances was not bound by its cashier's fraud.

Subsequently, and before all of the money had been checked out by the bankrupt, the directors examined the note, the financial state-

ment attached thereto, and thereupon, clearly in reliance upon the false financial statement, approved the loan. The remaining unused credit subsequently checked out was therefore clearly extended at that time in reliance upon the statement. The master's finding is therefore erroneous.

[2] 2. Exception was taken to the master's report on the ground that he failed to find that the bankrupt knew that the statement made by him was false, and that it was intentionally so made. The master alone saw the witnesses. The determination of this question depended upon his judgment as to the credibility of the bankrupt. The bankrupt's direct statement as to the facts bearing thereon was not contradicted. If, seeing and hearing him, the master believed his story, a finding that the statement was not knowingly and intentionally false would have been proper; but, on the other hand, if the master did not find the bankrupt's testimony to be credible in this respect, the contrary finding would have been proper. We should have felt ourselves bound under all of the circumstances by the master's conclusion of facts on this point.

Under modern practice, as sanctioned by the new rules in equity, testimony is ordinarily taken orally instead of by deposition. A better opportunity is thus afforded to determine questions of fact dependent upon the veracity and credibility of witnesses. In this case, the trial judge, who found this ultimate fact in accordance with the bankrupt's testimony, did not have this opportunity. While we cannot say from the printed record that his conclusion is erroneous, nevertheless, in our judgment, full and complete justice can be done to all parties only if the finding be based upon an observation of the witnesses as well as upon the testimony.

The order will therefore be reversed, and the cause remanded to the District Court, with direction either to remit the matter again to the master for further report and findings on the evidence taken heretofore, together with such additional evidence as he may deem it proper to permit either party to present, or to take testimony in the District Court upon the question of the bankrupt's knowledge and intent.

(257 Fed. 294)

GOFF v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1919.)

No. 5110.

1. CRIMINAL LAW ⟹563—SUFFICIENCY OF EVIDENCE—PROOF OF CORPUS DELICTI.

   Evidence *held* insufficient to sustain a conviction where, aside from statements made by defendant before his arrest, it was as consistent with the commission of a different offense as with that of the crime charged.

2. CRIMINAL LAW ⟹535(1)—DECLARATIONS BY ACCUSED—NECESSITY OF CORROBORATION.

   A conviction on statements of the defendant will not be sustained without corroborative proof of the corpus delicti.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. INDIANS ⟹38(5)—INTRODUCING INTOXICATING LIQUORS INTO INDIAN COUNTRY IN INTERSTATE COMMERCE—EVIDENCE.

The provision of Act May 18, 1916, making the possession of intoxicating liquor in the Indian country prima facie evidence of its unlawful introduction, does not apply where the charge is the carrying of liquor from outside the state of Oklahoma into that part which was formerly Indian Territory.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Joseph W. Woodrough, Judge.

Criminal prosecution by the United States against R. E. Goff. Judgment of conviction, and defendant brings error. Reversed.

Frank Lee, of Muskogee, Okl. (J. C. Denton, of Muskogee, Okl., on the brief), for plaintiff in error.

C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

WADE, District Judge. Defendant was indicted for, and convicted of, the crime of introducing liquor from without the state into that part of the state of Oklahoma which was formerly Indian Territory. He was found by officers in Nowata, Okl., traveling in a Ford car equipped with a false bottom, having concealed in and about the car more than 280 pints of whisky and some beer. The indictment charged only that defendant "did introduce and carry into the county and district aforesaid, from without the state of Oklahoma," liquor found in his possession.

At the close of the evidence offered by the government, the defendant demurred to the evidence as insufficient to prove the crime charged, for the reason that the corpus delicti was not established, which demurrer was overruled, the defendant excepting. The defendant offered no evidence, the case was argued, the jury instructed, and a verdict of guilty returned.

[1] 1. The defendant by this appeal renews his contention that there was no evidence offered by the government, aside from the proven statements of the defendant, tending to prove that the liquor found in the custody of the defendant, was in fact brought into the state, and it is insisted that the statements or admissions made by the defendant are not alone sufficient to establish such fact.

Two elements are involved in the offense charged: (1) That the liquor was in fact brought into Oklahoma from some point without the state; and (2) that the defendant was the person who brought it in. A careful examination of the record discloses no fact or circumstance, aside from the statements of the defendant at the time of his arrest, tending to show that the liquor was introduced into the state at the time alleged by any one.

Nowata, where the defendant was apprehended, is located about 24 miles from the Kansas line, and at least twice that far from the

Missouri line. The careful concealment of liquor in a car with a false bottom was just as consistent with ordinary "bootlegging" as with introducing. There is proof that there was a large stock of liquor about this time at South Coffeyville, Okl. If, as suggested by counsel (though without any competent evidence to sustain such contention), the defendant procured the liquor at South Coffeyville with the purpose of retailing it in the state, his plan for concealment would probably be just as ingeniously devised, and his mode and direction of travel would probably have been the same.

There is no attempt to prove that there were not dozens of other places in that part of the state where the supply could have been obtained. The facts and circumstances (aside from the statements of the defendant) being just as consistent with guilt of some other offense, it cannot be held sufficient as proof of the particular offense charged.

[2] The defendant first stated to the officers that he was traveling from his home in Pittsburg, Kan.; but, after the liquor was discovered, he stated that he came from Joplin, Mo., and was on his way to Tulsa, Okl. The rule of this court as to the effect of statements or confessions, in establishing the corpus delicti, is as follows:

> "A conviction upon extrajudicial confession, or acts or declarations of a prisoner, will not be sustained, without corroborative proof that the property was in fact stolen." Naftzger v. United States, 200 Fed. 494, 118 C. C. A. 598.

See, also, 4 Chamberlayne, Evidence, § 1600.

We do not hold that declarations of a party may not be considered in finding the corpus delicti; but, standing alone, they are insufficient, and other facts and circumstances cannot be said to be corroborative, when they point as directly to some other offense as they do to the crime charged.

[3] 2. Counsel for the government insist that possession of liquor in Oklahoma is by act of Congress of May 18, 1916, "prima facie evidence of unlawful introduction." 39 Stat. 123, c. 125. This court has already ruled adversely to this contention. Chambliss v. United States, 218 Fed. 154, 132 C. C. A. 112; Sellers v. United States, 222 Fed. 1023, 137 C. C. A. 666; Lewellen v. United States, 223 Fed. 18, 138 C. C. A. 432. And furthermore the case was not tried upon this theory.

The case is reversed and remanded to the District Court, with directions that a new trial be granted.

(257 Fed. 297)

AMERICAN CAR & FOUNDRY CO. v. ROCHA.*

(Circuit Court of Appeals, Eighth Circuit. March 24, 1919. Rehearing Denied May 21, 1919.)

No. 5227.

MASTER AND SERVANT ⟹185(27)—MASTER'S LIABILITY FOR INJURY TO SERVANT —SAFE PLACE TO WORK.

Where plaintiff was at work under a car, which had been raised from its trucks and blocked up, his employer owed him a positive duty to warn him before the car was moved, which could not be delegated to another employé, so as to relieve itself from liability for its negligence resulting in plaintiff's injury.

In Error to the District Court of the United States for the Eastern District of Missouri; Jacob Trieber, Judge.

Action at law by Saropia Rocha against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William R. Gentry, of St. Louis, Mo. (M. F. Watts and Edwin W. Lee, both of St. Louis, Mo., and G. A. Orth, of New York City, on the brief), for plaintiff in error.

Edward W. Foristel and Jesse T. Friday, both of St. Louis, Mo., for defendant in error.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. Rocha sued the foundry company to recover damages for personal injuries alleged to have been caused by the negligence of the latter. The plaintiff recovered a verdict, and defendant assigns error.

The only evidence introduced was that of the plaintiff. It showed that on the 17th day of May, 1917, the plaintiff, while in the employ of the defendant, was directed by a foreman to go under a railroad car, which had been raised from its trucks and was resting on some blocks, to tighten up some bolts and nuts. While the plaintiff was partially under the car, with his left leg over one of the axles of the truck, the foreman, without any warning to the plaintiff, caused the car to be moved by a derrick or hoisting machine. The movement caused the car to fall upon plaintiff, thereby breaking one of his legs. Counsel for defendant moved for a directed verdict in its favor, upon the ground that the foreman was a fellow servant of the plaintiff, for whose negligence the defendant was not liable. The same point was raised in other ways. This is the only question specified and discussed in the briefs of counsel.

The plaintiff's petition in substance alleged that the defendant was negligent in ordering the plaintiff under the car and in moving the same while he was still under the car without warning. The defendant's answer denied negligence and pleaded contributory negligence. The defense of fellow servant was not pleaded. We think it is immaterial

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*Certiorari denied 250 U. S. —, 40 Sup. Ct. 11, 64 L. Ed. —.

whether the foreman was a fellow servant of the plaintiff or not. In a case like the present it was the positive duty of the defendant to warn the plaintiff that the car was about to be moved. This duty could not be delegated to the foreman by the defendant, so as to relieve itself of liability for his negligence.

We do not deem it necessary to cite authority in support of a rule so well established.

The judgment below is affirmed.

(257 Fed. 298)

McDOWELL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919.)

No. 5218.

CRIMINAL LAW ⟹753(1)—TRIAL ⟹178—MOTION FOR DIRECTED VERDICT—EFFECT.

It is the practice in the Eighth circuit to regard a general motion or request for a directed verdict, in either a civil or criminal case, as challenging the legal sufficiency of the evidence for a contrary conclusion.

In Error to the District Court of the United States for the District of North Dakota; Martin J. Wade, Judge.

Criminal prosecution by the United States against James McDowell. Judgment of conviction, and defendant brings error. Reversed.

Sullivan & Sullivan, of Mandan, N. D., and E. T. Burke, of Bismarck, N. D., for plaintiff in error.

Melvin A. Hildreth, U. S. Atty., of Fargo, N. D. (John Carmody, Asst. U. S. Atty., of Fargo, N. D., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges.

HOOK, Circuit Judge. James McDowell was convicted of perjury at the trial of one Joseph Couture for stealing a horse belonging to the United States. A writ of error in Couture's case was recently disposed of by this court. 167 C. C. A. 597, 256 Fed. 525. At the conclusion of the evidence in this case, McDowell asked the court to direct the jury to acquit him. The denial of the request is assigned as error.

The bill of exceptions certified as containing all the evidence at the trial wholly fails to show false swearing by the accused. In fact, it does not appear that he even testified at the trial of Couture. Doubtless with this in mind, counsel for the government say that, as no grounds appear in the motion for a directed verdict, it will be presumed that there was sufficient evidence of guilt. Our practice has been to regard a general motion or request for a directed verdict as challenging the legal sufficiency of the evidence for a contrary conclusion, and we are constantly applying it. It is in harmony with the practice in the Sixth circuit (Louisville & N. R. Co. v. Womack, 97 C. C. A. 559, 566, 173 Fed. 752, 759), though not with that in the Seventh circuit (Adams v. Shirk, 43 C. C. A. 407, 104 Fed. 54). Counsel argue the

question whether the theft of the horse which was bought by or for an Indian was, in view of certain special circumstances and conditions, a theft of "property of the United States" within the meaning of the statute (section 47, Penal Code [Act March 4, 1909, c. 321, 35 Stat. 1097; Comp. St. § 10214]) under which Couture was prosecuted, but in the state of the record we do not think we should consider it.

The sentence is reversed, and the cause is remanded for a new trial.

(257 Fed. 299)

BOATMEN'S BANK v. LAWS et al.

In re BRYANT, GORE & BOWMAN SALES CO.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1919.)

No. 197.

BANKRUPTCY ⟹326—CLAIM OF STOCKHOLDER—STOCK LIABILITY—SET-OFF.

Where a creditor stockholder of a bankrupt corporation had a claim against the bankrupt for $20,853.94, and his indebtedness on his stock was $10,000, for which amount corporation's trustee in bankruptcy recovered judgment, after which the stockholder was himself adjudged a bankrupt, his assignee could not have the amount of the judgment credited on the amount of the assigned claim and dividends on the balance of the claim paid to it, but dividends on such claim were first applicable on the judgment until that should be extinguished, and then, if there were other dividends, they were applicable to payment of the claim.

Petition to Revise Order of the District Court of the United States for the Eastern District of Missouri; John C. Pollock, Judge.

In the matter of the Bryant, Gore & Bowman Sales Company, bankrupt. Petition by the Boatmen's Bank against C. R. Laws and others, trustees, etc., to revise order of District Court. Petition denied.

Sears Lehmann, of St. Louis, Mo. (Lehmann & Lehmann, of St. Louis, Mo., on the brief), for petitioner.

Lee Grant, of St. Louis, Mo. (Grant & Grant, of St. Louis, Mo., on the brief), for respondents.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. This case will be considered on the petition to revise. The respondents, as trustees of the estate of Bryant, Gore & Bowman Sales Company, a bankrupt, obtained a judgment against one E. M. Bowman for a stock liability as a member of said company, in the sum of $10,000. Bowman had a claim against the bankrupt duly proved and allowed in the sum of $20,853.94. He assigned his claim to the petitioner. After the judgment was obtained against Bowman, he was adjudged a bankrupt, and his estate paid no dividends. The referee refuses to pay to petitioner any dividends, arising from the administration of the estate of the Sales Company, on the Bowman claim, until sufficient of said dividends have been applied on the judgment against Bowman to extinguish the same.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Petitioner claims that the amount of the Bowman judgment should be credited on the amount of its claim as assignee of Bowman and the dividends arising on the balance of the claim, should be paid to it. In Moise v. Scheibel, 245 Fed. 546, 157 C. C. A. 658, this court decided that no dividends should be paid on the claim of Moise until his stock liability should be ascertained and paid. The proceedings in bankruptcy are to be conducted upon equitable principles.

The judgment against Bowman is an asset belonging to all the creditors of the bankrupt estate. The trustees cannot use it to pay one creditor. The only equitable way to proceed is to require the payment of the Bowman judgment into the estate and then distribute the proceeds between all creditors. Bowman being insolvent, the only method left is to apply dividends arising upon the Bowman claim to the payment of the Bowman judgment until it shall be paid, and then, if there are other dividends, they should be applied to the claim of petitioner. The case of Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559, is the only case cited in support of the petition to revise. So far as that decision is applicable to the question here involved it is in line with the conclusion here reached. It plainly decides that the claim of a creditor stockholder should not even be allowed until his indebtedness to the bankrupt has been collected by plenary suit. The opinion also states that if the indebtedness of the creditor stockholder cannot be collected, then the creditor's claim may be reduced by the amount of the debt; but this is far from saying that, if the trustee can reach any property, he may not take it.

The petition to revise is denied, with costs.

The appeal, No. 5214, is dismissed.

(257 Fed. 300)

ILLINOIS PARLOR FRAME CO. v. GOLDMAN.

In re NATIONAL UPHOLSTERING CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1919.)

No. 2669.

BANKRUPTCY ⟹165(3)—PREFERENCE—TRANSFER FOR PRESENT CONSIDERATION.

Where one, fraudulently induced to sell goods on credit, accepted from the buyer, within four months preceding a petition in bankruptcy against the buyer, a transfer of accounts in payment for the goods, the transfer was made in consideration of release of right to rescind and recover the goods, and was not a preference.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Jacob Goldman, as trustee in bankruptcy of the National Upholstering Company, against the Illinois Parlor Frame Company, to recover payments claimed as preferences. Decree for complainant, and defendant appeals. Reversed and remanded, with direction to reduce the amount by allowing credit for certain items.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Samuel B. King, of Chicago, Ill., for appellant.
Joseph Kamfner, of Chicago, Ill., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

MACK, Circuit Judge. While appellant gave bankrupt a line of credit to the amount of $1,000, it was induced to increase this subsequently to April 1, 1916, by certain material false and fraudulent representations of the bankrupt's manager, so that on June 9, 1916, the indebtedness amounted to $5,795.70. On that day, after discovery of the fraud, accounts aggregating in face value over $4,000 were transferred to appellant and were entered on the books as a cash credit. Thereafter additional accounts were transferred, certain goods were returned and credited at a fixed valuation, and certain additional goods were delivered to the bankrupt. Petition in bankruptcy was filed October 4, 1916.

On suit by the trustee in bankruptcy to recover preferences, the court, confirming the master's report, entered a money decree for the face value of the accounts and the fixed value of the returned goods, less the price of the goods sold to the bankrupt after June 9th.

1. Without detailing the evidence, in our judgment, it fully supports the findings of insolvency, preference, and appellant's knowledge thereof on June 9th.

2. Evidence of the goods sold to the bankrupt after April 1st and on hand June 9th was rejected by the master as immaterial, on the theory that taking payment or security on account of the entire debt was a confirmation, not a repudiation, of the earlier sales, and that, in that aspect, the payment must be deemed to have been made on an antecedent debt.

But on June 9th appellant concededly had a right to rescind the fraudulent sales and to recover back such of the goods as were then in the bankrupt's possession. Clearly a return of these goods would not be a preference; to the extent of their value, payment could no more effectuate a preference; neither transaction would diminish the estate to which bankrupt was then entitled. That appellant did not expressly assert a right of rescission is immaterial; it relinquished that right in confirming the sale; it then gave up a property interest equal to the value of the goods then on hand. To that extent the transfer was for a present consideration, and not preferential.

While the master has reported the evidence offered by appellant as to the goods then on hand, inasmuch as appellee has had no opportunity to controvert it, the decree will be reversed, and the cause remanded, with direction to reduce the amount of the decree against appellant by such sum as may be found to be the value of the goods sold subsequent to April 1, 1916, and on hand June 9, 1916, with interest thereon, and to permit appellant to file a claim as a general creditor for so much as may be found to be preferential.

(257 Fed. 302)

KINDRED v. BLACK.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1919.)

No. 5240.

APPEAL AND ERROR ⟹849(1)—REVIEW—CAUSE TRIED TO COURT.

Where an action at law was tried to the court, jury being waived, a general finding for one party made, with no requests for general or special findings or declarations of law by the other party, the appellate court can review only the rulings of the trial court on the admission and exclusion of evidence.

In Error to the District Court of the United States for the Western District of Missouri.

Action at law by William L. Black against Luther P. Kindred. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles W. German, of Kansas City, Mo. (James F. Getty, of Kansas City, Kan., and Haff, Meservey, German & Michaels, of Kansas City, Mo., on the brief), for plaintiff in error.

Roland Hughes and Francis M. Wilson, both of Kansas City, Mo., for defendant in error.

Before CARLAND, Circuit Judge, and AMIDON, District Judge.

CARLAND, Circuit Judge. Black sued Kindred to recover damages for false representations in the sale of real estate. A jury being waived, the case was tried to the court, with the result of a general finding for the plaintiff. There were no requests to find either generally or specially, or any requests to declare the law, made by Kindred. In this state of the record there is nothing for us to review, except errors in the exclusion or admission of evidence, and the error in this behalf specified and discussed in the brief has no merit. Section 700, Rev. Stat. (Comp. St. § 1668); Keely v. Mining Co., 95 C. C. A. 96, 169 Fed. 598; Mason v. United States, 135 C. C. A. 315, 219 Fed. 547.

Judgment affirmed.

(257 Fed. 302)

MINNEAPOLIS, ST. P. & S. S. M. RY. CO. et al. v. BARNETT & RECORD CO.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1919. Rehearing Denied June 28, 1919.)

No. 5101.

1. PATENTS ⟹26(1)—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

A new combination of old elements whereby an old result is obtained in a more facile, economical, and efficient way is as securely protected by a patent as is a new machine or composition of matter, provided the discovery and reduction to practice of the novel combination rose above the reach of the skill of the mechanic trained in the art.

2. PATENTS ⟹243—PATENTS FOR COMBINATIONS.

When the advance toward the desideratum is gradual, and several inventors formed different combinations, which accomplished the result

sought with varying degrees of success, each is entitled to his own combination, as long as it differs from those of his competitors and does not include theirs.

3. PATENTS ⟹66—ANTICIPATION—PATENTS FOR COMBINATION.
That prior patents separately disclosed one or more of the elements of a later patent, while no one of them disclosed them all, does not necessarily establish anticipation by any of them.

4. PATENTS ⟹324(5)—DECISIONS SUSTAINING VALIDITY—REVIEW ON APPEAL.
Where a patent has been granted and sustained by a trial court, the legal presumption is that the decisions of the Patent Office and the court in an infringement case, were right, and they may not lawfully be reversed by an appellate court, unless there is clear and convincing proof in the record that they have made some serious mistake of fact or fallen into fatal error of law.

5. PATENTS ⟹53—ANTICIPATION—UNCOMPLETED INVENTION.
The mere conception of an invention and the drawing of plans and sketches thereof does not constitute one an inventor for the purpose of anticipating a later patent to another.

6. PATENTS ⟹174, 177—SCOPE—USES UNKNOWN TO PATENTEE.
When a patentee has plainly described and claimed his improvements or combinations, he has the right to every use to which they can be applied, and to every way in which they can be utilized, whether or not he was aware of them when he secured his patent.

7. PATENTS ⟹157(2)—CONSTRUCTION TO GIVE VALIDITY AND EFFECT.
It is one of the fundamental rules for the interpretation of contracts and grants, especially applicable to grants of patents, that in case of doubt or ambiguity that construction should be preferred which sustains and vitalizes, rather than that which strikes down and paralyzes.

8. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—GRAIN ELEVATOR.
The McQueen patent, No. 896,233, for a working elevator, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit in equity by the Barnett & Record Company against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company and the Tri-State Land Company. Decree for complainant, and defendants appeal. Affirmed.

Frank Parker Davis and Edward Rector, both of Chicago, Ill. (Thomas F. Wallace, of Minneapolis, Minn., on the brief), for appellants.

Amasa C. Paul, of Minneapolis, Minn., for appellee.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

SANBORN, Circuit Judge. This appeal questions the decree of the District Court that Finlay R. McQueen was the original inventor of the combinations and improvements illustrated by letters patent No. 896,233, issued to him on August 18, 1908, on his application filed June 20, 1907, and particularly pointed out in the first and second claims thereof, that the plaintiff below, the Barnett & Record Company, a corporation, is the owner thereof and of all claims for the past use thereof, that the first and second claims of the patent are valid, that the defendants have infringed those claims, and that the plain-

tiff recover the profits the defendants have obtained and the damages the plaintiff has sustained by reason of the infringement.

In this court counsel for the defendants contend that the decree should be reversed, because the evidence establishes the facts that the patent of the combinations of claims 1 and 2 is invalid, that McQueen was not the first inventor thereof, and that the conception and reduction to practice of the combinations there claimed did not constitute invention. They concede, however, that if neither of these positions is tenable the defendants were guilty of infringement.

The combinations described and secured by the patent relate to improvements in working grain elevators as distinguished from storage elevators. They relate to that type of grain elevator in which the grain may be cleaned, graded, weighed, otherwise worked, and distributed as in working elevators, as well as received, stored, and shipped, as in storage and terminal elevators. At the time McQueen conceived his combinations, an approved type of such an elevator consisted of a workhouse, of circular grain bins, supported by walls or girders and columns above the workhouse, and of a cupola or tower of four or five stories above the bins, wherein the machinery for elevating, spouting, garnering, weighing, and cleaning the grain could be located and operated. Prior to 1905, when McQueen conceived his combinations, such working elevators had been generally constructed of wood or metal, although the basement or the structure beneath the bin floors had often been made of masonry or reinforced concrete. The reason why the bins in such elevators had not usually been constructed of masonry or reinforced concrete seems to have been that the weight of the latter was so great, that the expense of supporting them over the workhouse upon columns and girders or walls was so great, and the necessary columns or walls occupied so much space in the workhouse, that iron or steel, or even wood, bins had been thought preferable to masonry or concrete bins. The danger of fire, however, and the great amount of wood requisite to resist the pressure of the grain, gradually diminished the use of wood, and there were serious objections to metal as material for such bins. Unless the walls of metal bins were made very thick and heavy, or unless they were very strongly and heavily braced and tied with metal rods, they were liable to buckle, crack, or tear open, when one of two or more adjacent bins was emptied of its contents while the others were filled, on account of the pressure of the grain upon the vacant bin.

During the years between 1895 and 1905, the use of metal reinforced concrete had rapidly increased, and its advantages as a building material had become more and more evident, until builders of working elevators became anxious to construct grain bins for working elevators of reinforced concrete or masonry, but in the then state of the art very heavy and expensive walls, or heavy and expensive girders resting upon many columns, were indispensable to sustain bins of such material over a working house, and such walls, or columns and girders, were so expensive and so cumbered, and occupied so much space in the working house, that they practically prohibited the use of concrete or masonry bins in elevators of this type. In order to

make the use of such bins in such a working elevator practically and commercially possible, it was necessary to find, and demonstrate by reduction to practice, a way to construct, sustain, and operate masonry or metal reinforced bins over a working house without the prohibitive expense of the heavy walls or girders and the numerous columns occupying so much space, which in the then state of the art, were necessary to hold up such bins.

Up to the time that McQueen discovered the combinations of his patents, no one had succeeded in accomplishing this in the United States. McQueen discovered combinations of old elements that accomplished the desideratum, and embodied them in an actual, practical, monolithic structure by means of which the cost of such practical working elevators was reduced about from 12 per cent. to 25 per cent. Working elevators with concrete metal reinforced bins constructed in accordance with the claims and specification of his patent speedily came into common use, and achieved abundant commercial success, so that, when the defendant came to construct the infringing elevator, it selected and built its elevator on the principle of McQueen's combinations, which it embodied therein.

McQueen, in his patent, limited the material in which the bins of his combinations should be embodied to masonry or metal reinforced concrete, preferring the latter. Speaking, then, of concrete, although what is hereafter said is equally applicable to masonry, the principle of McQueen's combinations, and of the working elevator in which he embodied them, is the hanging or suspension above the working house of numerous cylindrical metal reinforced concrete grain bins, placed close together in parallel rows in two directions, so that each bin shall be supported at two diametrically opposite points only, and only by columns, made of the same material as the bins, founded on the heavy concrete basement floor of the working house, rising vertically through the working house and the bin floor, made of the same material, and extending, on diametrically opposite sides of each bin, between the tangentially abutting sides of it and the adjacent bins, unified and made into one monolithic structure with the adjoining bins respectively, between which each column extends from the top to the bottom thereof, by metal reinforced vertically extended connecting bodies of the same material, which include and become one with these columns and the adjoining bins respectively, and extend from top to bottom of the bins, each of which bins is also united at its two other tangentially abutting portions, along which no column rises. by like metal reinforced vertically extended bodies made in one with the two bins between which they respectively extend from top to bottom, so that the columns, the bins, the vertically extending bodies of metal reinforced concrete between the tangentially abutting portions of the bins, are all rigidly united and made into one homogeneous monolithic structure, hung upon and sustained above the working house, so that the bins are suspended only at two diametrically opposite points by the columns which have been described, and by those columns only which sustain the entire monolithic structure and the cupola above the bins, which was preferably made of metal and sup-

ported on columns, the foot of each of which was founded on the top of one of the extended vertical metal reinforced columns, which extended to the top of the bins and of the monolithic structure. McQueen also described in his specifications and claims the combination which has been described, with transverse tie walls extending from the top to the bottom of the monolithic structure, whereby portions of the spaces between the bins on opposite sides of the tangentially connected portions of the bins were cut off, and closed spaces were thereby provided between the bins for elevator legs through the monolithic structure from the cupola to the working house.

McQueen's two claims here in suit read in this way:

"1. The combination with a multiplicity of masonry bins having their axes arranged in rows in two directions and having their tangentially engaged sides rigidly united by masonry body portions, certain of which constitute column extensions, and supporting columns below said bins vertically aligned and united with said tangential column extension portions of said bins and serving to support the said bins only at two diametrically opposite points, substantially as described.

"2. The combination with a multiplicity of bins having their axes arranged in rows in two directions and on lines that intersect each other approximately at a right angle and having tangentially engaging sides united by vertically extended masonry body portions, certain of which constitute column extensions, supporting columns below said bins, vertically aligned and united with said tangential column extension portions of said bins and supporting said bins at two diametrically opposite points only, and certain of which bins are further connected by transverse tie walls that extend from top to bottom of said bins and form, on opposite sides of the tangentially connected portions of the bins, spaces through which elevator legs may be passed, substantially as described."

[1] This is a patent for a combination of old mechanical elements. It is not for the columns, or bins, or working house, or the masonry, or the metal reinforced concrete. It is for the novel combination of the various elements described and claimed, whereby the whole result is obtained in a more economical and useful way. A new combination of old elements, whereby an old result is obtained in a more facile, economical, and efficient way, is as securely protected by a patent as is a new machine or composition of matter, provided that the discovery and reduction to practice of the novel combination rose above the reach of the skill of the mechanic trained in the art. Seymour v. Osborne, 11 Wall. 516, 542, 548, 20 L. Ed. 33; Gould v. Rees, 15 Wall. 187, 21 L. Ed. 39; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 369, 131 C. C. A. 504.

[2] Counsel have spread upon the record an exhaustive display of the history of the art of constructing grain elevators, and of its state at the time when McQueen conceived and reduced to useful and commercial practice his patented combinations. This portrayal clearly discloses the fact that the advance toward the fortunate and successful working elevator which he conceived and constructed was gradual, and that in the progress of that advance mechanics and inventors at different times found different combinations whereby they approached the result of constructing useful working elevators with varying degrees of success. This history of the art brings this case under the familiar rule that when the advance toward the desideratum is

gradual, and several inventors formed different combinations, which accomplished the result sought with varying degrees of success, each is entitled to his own combination, as long as it differs from those of his competitors and does not include theirs. Railway Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053; McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930.

[3] Patents, publications, and actual structures have been proved, some of which disclosed one, and others more, of the old elements of McQueen's combinations; but the fact that one of these disclosed one and another another or more elements of the patented combination, while none of them discloses all of the elements thereof, does not necessarily establish the fact that any of them anticipates the combinations of the plaintiff. Imhaeuser v. Buerk, 101 U. S. 647, 660, 25 L. Ed. 945; Bates v. Coe, 98 U. S. 31, 48, 25 L. Ed. 68; Owens Co. v. Twin City Separator Co., 168 Fed. 259, 265, 93 C. C. A. 561.

[4] The two claims of the patent here in suit have been sustained by the expert examiners of the Patent Office and by the learned judge below who tried this case. The legal presumption is that the decisions of these officers were right. Their decrees may not lawfully be reversed, unless there is clear and convincing proof in the record before us that they have made some serious mistake of fact, or have fallen into a fatal error of law in the determination of the questions before them.

No good purpose would be served by attempting to embody the history of this art, or to portray its state in 1905, when McQueen conceived his alleged invention, in this opinion. It will be sufficient to notice the prior patents, publications, and structures, which appear from the testimony to be those most closely resembling the devices of McQueen. Mr. Browne, the main witness and the expert for the defendants, testified that in his opinion patent No. 37,134, to George H. Johnson, issued December 9, 1862, came nearer than any others to showing the complete combination of claim No. 1 of McQueen's patent, but that he had found no prior patent, publication, or structure, which disclosed the entire combination of either the first or second claim thereof. This patent to Johnson clearly demonstrates the fact that he was trying by the improvements he describes therein as early as 1862 to find some way to remedy the defects of cylindrical iron grain bins. He writes in his specifications that previous to his invention storehouses for grain had been constructed of cylindrical iron bins, arranged vertically and in contact with each other, and that the spaces between the bins had been employed as supplemental bins, but that when the grain was drawn off from one of these iron grain bins the sides were apt to collapse, not being of sufficient strength to resist the pressure of the grain in the filled bins adjacent to them. To remedy this evil he described and claimed small cylindrical iron bins placed in the spaces between the larger bins, and wrote that, while that feature was applicable to iron cylindrical bins, he had shown it with other features, which he claimed as applied to a new construction of bins and cylinders formed of brickwork tied together by means of plates and rods of iron. He then described cylindrical

bins of brickwork, tied together by horizontal bond plates and vertical tie rods, "sustained on a suitable floor, by arches *D* and columns *E* of masonry, brickwork, or iron, as deemed expedient." But this structure of Johnson (1) did not constitute a working elevator, but a mere storehouse; (2) was not suspended or supported over a workhouse, leaving a broad open space for working the grain beneath the bin floor, but was sustained on arches and columns beneath the bin floor, occupying much of the space there; (3) was not sustained by columns founded on the concrete floor of the basement of a workhouse extended vertically through the bin floor and between the tangentially abutting portions of masonry or concrete bins to their tops, so that the bins were supported thereon only at two diametrically opposite points; (4) did not consist of a rigid union and a consolidation in one monolith of such vertical columns, bin floors, bins, body portions made of masonry or of metal reinforced concrete between the tangentially abutting portions of the bins, and hence it failed to disclose the principle or mode of operation of McQueen's combinations, or the means which attained the desired result, nor did it anticipate the combinations of either of the claims in this suit.

Among other alleged anticipations or in the evidence to sustain lack of invention to which counsel for the defendants refer are:

Patent No. 24,424, to Badger and Sampson, of June 14, 1859, for the substitution of brick, stone, or iron square or tubular grain bins for wooden bins, which discloses such bins standing on a platform supported by two sets of arches beneath them, sustained on columns beneath the arches. But this disclosure lacks (1) the exclusive location of the supporting columns vertically under the tangentially abutting portions of the bins; (2) the continuous columns extending from basement floor of workinghouse through the bin floor between the tangentially abutting portions of the bins to their tops; (3) the body portions extending vertically between the tangentially abutting portions of the bins through their entire length rigidly uniting in one monolithic whole the bins and the columns between the bins; (4) the hanging or suspension of the bins and the entire monolithic structure on the continuous columns made in one therewith only at two diametrically opposite points of the bins, and other less material elements of McQueen's combinations, while it portrays the double arches and the unnecessary columns under the bin floor which it was one of the objects of McQueen's improvement to dispense with.

Patent No. 777,730, to Jamieson, issued December 20, 1904, for a complex, confused, and complicated method of binding together concrete and metal in a grain bin structure consisting of columns and bins which lacks (1) the cylindrical bins; (2) the working house beneath the bins; (3) the suspension of the bins above the working house by continuous columns only at two diametrically opposite points of the bins; (4) the tie walls and the spaces for the elevator legs of McQueen's combinations.

Patent No. 662,452, of November 27, 1900, to James Macdonald, for combinations of cylindrical sheet metal grain bins in the form of nested bins in a storage warehouse which lacks (1) the work-

house; (2) the suspension of the bins above the workhouse; (3) the continuous columns from the basement of the workhouse to the top of the bins; and (4) the support of the bins only at two diametrically opposite points by continuous vertical columns founded on the heavy cement basement of the workhouse and extending up through the workhouse between the tangentially abutting portions of the bins to their tops rigidly united and made in one with them, and many other less material elements of McQueen's combinations.

All these and all the other less material patents presented by the record, have been carefully examined, but none has been found which comes nearer to disclosing the combinations of McQueen, or to an anticipation thereof, than the patent to Johnson which was first discussed, and this court is not persuaded that the Johnson patent, or that any of the patents disclosed in this record, fairly anticipated the combinations of the claims 1 or 2 of the patent to McQueen.

Counsel has cited as an anticipation of these claims the copyrighted book of the Architectural Iron Works of the year 1865 at pages 7, 60, 61, 62, which portrays the Brooklyn Iron Elevator. This iron elevator was a storage and transfer elevator constructed to store and transfer grain from cars to ships. It was built about 1865, and torn down about 1902. It was provided with cylindrical iron bins "made like boilers of riveted plate iron" arranged in rows at right angles, supported on a flat floor, which rested on iron girders, sustained by iron columns beneath the girders. It contained somewhere between 60 and 90 bins. The testimony is conflicting on the question whether the columns were located vertically beneath the tangentially abutting portions of the bins, or vertically beneath the centers of the bins. The evidence for the former location consists principally of the description in the book of the Architectural Iron Works and the testimony of witnesses who saw the elevator before it was torn down, or the site of it after its removal. The evidence for the latter location consists of the blueprints of the drawings, made by George H. Johnson, the engineer for the construction of the elevator, which were found after his death among his papers, and which showed the columns vertically under the centers of the bins, and the testimony of witnesses to the discovery of these plans and the preservation of them. There was also testimony upon each side of this question of witnesses relative to the interpretation or meaning of the disclosures in the book of the Architectural Iron Works and the plans and sketches which were introduced in evidence. All this evidence has been carefully and repeatedly examined. But in the light of the fact that the witnesses who saw the elevator testified more than 12 years thereafter, of their uncertainty as to the details of the construction, and of the unreliability of the memory of men after so many years, and of the established rule of law that the burden was upon the defendants to prove the location of these columns by clear, convincing, and satisfactory evidence, the proof in this record has failed to convince that the columns of the Brooklyn Iron Elevator were located vertically under the tangentially abutting portions of the bins, or that it embodied either the principle or the combinations of the first or second claims of the pat-

ent to McQueen. It lacks these material elements or attributes of McQueen's combinations: (1) The continuous columns of metal reinforced concrete or masonry extending from the basement floor of a working house beneath the bins up through the workhouse, the bin floor, and between the tangentially abutting portions of the bins to their tops; (2) the rigid union of the tangentially abutting portions of the bins, the columns between them and the body portions of the concrete extending from the top to bottom of the bins; (3) the construction out of metal reinforced concrete or masonry in one homogeneous monolithic whole of the continuous columns, the bins, the body portions between them, and the floor beneath them; and (4) the suspension and support of this monolithic structure by the columns only at two diametrically opposite parts of the bins; and the conclusion is that the Brooklyn Elevator failed to anticipate the patented combinations here in issue.

About the year 1901 at Buffalo, N. Y., an elevator was built, called the Dakota, wherein iron or steel cylindrical bins were supported by four continuous iron or steel columns to each bin, extending vertically between the abutting portions of the bins. It is persuasively argued that this elevator anticipates the combinations of McQueen, and demonstrates the fact that there was no invention in conceiving and reducing them to practice, because it required no exercise of the inventive faculty to merely substitute masonry or reinforced concrete for iron or steel in this elevator, or to reduce the necessary number of supporting columns 50 per cent. Conceding that there is ordinarily no invention in the mere substitution in the construction of a building or elevator of one equivalent building material for another, it is too broad a statement to declare that there may never be invention in the substitution of one building material for another, and that is well illustrated by the story of this art. Johnson in his patent in 1862 suggested and described cylindrical bins of masonry supported on a floor resting on masonry, brickwork, or iron. It was not, however, until some 40 years after that, that metal reinforced concrete came even into limited use for cylindrical elevator bins, and then these bins were not suspended above a workhouse by continuous columns made in one with them and with other parts of the structure, as in McQueen's combination, but they were based on heavy masonry walls, or on heavy girders and columns of metal beneath them. The uses and capabilities of reinforced concrete, well known in this year 1919, were so far unknown in 1862 that there can be no doubt that it would then have been a novel and useful invention to have conceived and reduced to practice an elevator building, according to the plan of McQueen. Johnson's patent does not appear to have brought within the reach of the skill of the mechanic a practical and useful working elevator made of metal reinforced concrete, or of masonry based on and supported by heavy walls and columns, until about 40 years after the date of his patent, and neither Johnson's nor any of the other patents or structures disclosed in this case, nor all together, appear to have enabled any one to conceive and reduce to practice or commercial use in this country such a metal reinforced solid monolithic

structure of either concrete or masonry suspended above a workhouse only at two diametrically opposite points of cylindrical bins by continuous columns between them, extending from basement of workhouse to the top of the columns wherein the bins, the columns, and the body portions between them are all consolidated together in one homogeneous whole, until McQueen conceived and made the combinations secured by this patent. The desirability of sustaining concrete or masonry bins on columns above workhouses had long been known. Iron elevators had been so sustained, but the skill of the mechanic had demonstrated no way of so sustaining the great weight of metal reinforced concrete or masonry bins without prohibitive cost. McQueen conceived and provided combinations whereby such bins could be and have since been suspended on columns over workhouses at a cost of from 10 to 25 per cent. less than the cost of metal elevators of like capacity. If the Dakota Elevaor had been built in accordance with McQueen's patent, about one-half of the columns could have been dispensed with, the usable space beneath them for cleaning and working grain could have been greatly increased and from 10 to 25 per cent. of its cost could have been saved. The examiners of the Patent Office and the judge below were of the opinion that, to one who had conceived and reduced to practice and commercial use combinations which evidenced so striking an advance in the art of constructing working elevators, the title of inventor ought not to be denied, and this court is convinced that there was no error of law or mistake of fact in that conclusion.

This result has not been reached without a thoughtful consideration of the testimony of witnesses and of the other structures, publications, plans, and sketches which this record contains. Mr. Browne, the expert and main witness for the defendants, testified that in his opinion the Brooklyn Iron Elevator more nearly resembled the structure of McQueen's combinations than any other structure disclosed by the evidence, and Mr. Carter, the expert for the plaintiff, testified that in his opinion the Dakota Elevator enjoyed this distinction. As neither of them anticipates the patented combination of McQueen in suit, and no structure more nearly resembling McQueen's elevator has been discovered by the court from the evidence in this case, it is unnecessary to discuss the other disclosures at length.

[5] There was an elevator built in 1903 or 1904 in the Montreal Harbor, known in the evidence as the Montreal Harbor Elevator, under the supervision of Mr. Harry R. Wait, who testified that he conceived and made the sketches or plans therefor in 1902. The plan was to make the bins of that elevator of steel, and to support them by columns of steel or iron combined with a filling of concrete, and to have them extend between the tangentially abutting portions of the cylindrical bins to the tops thereof. There was a conflict and controversy in the evidence over the question whether or not Mr. Wait conceived his alleged invention and made his plans for this elevator in the United States or in Canada; but, even if the concession were made that he conceived the plan and made the sketches, drawings, and plans for it in this country in 1902, it is certain that he did not re-

duce it to practice in this country, nor was it patented or described in any printed publication, within the meaning of section 2943 of the Revised Statutes, before McQueen, in the belief that he was the original and first inventor of the thing patented to him, filed his application for his patent. Now Wait's reduction to practice of his alleged invention by the construction of monolithic homogeneous elevators in Canada was therefore a nullity, so far as diligence in reduction to practice is concerned, and the only material steps he took before McQueen filed his application were the mere conception of an alleged invention and the drawing of plans therefor. But the mere conception and drawing of plans or sketches thereof is insufficient to prove one an inventor. And the result is that the Montreal Harbor Elevator does not constitute an anticipation of McQueen's patented combinations, and, moreover, the evidence in this case falls far short of that clear, convincing, and satisfactory proof required to warrant a finding by this court that Wait was the first inventor of the combinations of McQueen in view of the latter's patent therefor. Sections 4886 and 4923, Rev. St. (8 U. S. Comp. St. 1916, §§ 9430 and 9469); Detroit Lubricator Mfg. Co. v. Renchard, 9 Fed. 293, 296; Automatic Weighing Machine Co. v. Pneumatic Scale Corporation, 166 Fed. 288, 298, 92 C. C. A. 206; Westinghouse Machine Co. v. General Electric Co., 207 Fed. 75, 77, 126 C. C. A. 575.

Before reaching this conclusion the opinion of Judge Cassels in 13 Exchequer Court Reports, Canada, 186, was carefully considered. It does not, however, rule the material issues in this case, because his question was the validity of McQueen's Canadian patent, the Montreal Harbor Elevator was available in his case as evidence of anticipation of that patent, and the sections of the Revised Statutes of the United States which make that structure unavailable as such evidence in the case in hand did not govern there and were irrelevant to the issues in his case.

[6] It was suggested in the course of the argument that the specifications and drawings of the patent to McQueen disclosed girders under a floor beneath the bins, and thereby indicated that when he made his invention, and when he described and claimed it, he did not know or conceive that the continuous columns of his combinations would and did support the bins and floor below them, without or notwithstanding the girders. It is not probable that he was thus ignorant or thoughtless, because in the first and second claims of his patent he does not include the girders or the floor, and he certainly would have done so, if he had thought them indispensable to his patented combinations. Moreover, even if this want of perception of the benefits of his invention existed, it would not be fatal to his patent, for, when one has plainly described and claimed his improvements or combinations, and secured a patent for them, he has the right to every use to which they can be applied, and to every way in which they can be utilized to perform their function, whether or not he was aware of all these uses and methods of use when he claimed and secured his monopoly. Roberts v. Ryer, 91 U. S. 150, 157, 23 L. Ed. 267; Miller v. Eagle Mfg. Co., 151 U. S. 201, 14 Sup. Ct. 310, 38 L. Ed. 121;

National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 709, 45 C. C. A. 544.

The evidence and arguments of counsel for the defendants to the effect that the combinations of the second claim, which consists of the combination of the first claim with the transverse tie walls that extend from top to bottom of certain of the bins, and form on opposite sides of the tangentially connected portions of the bins vertical spaces through which elevator legs may be passed from the cupola through the concrete or masonry structure to the working house below, one on one side and the other on the other side of the tangentially connected portions of the bins, was anticipated by the Dakota Elevator, the Great Northern Elevator, the Rialto Elevator, and other structures, and by the patents to Johnson, to Macdonald, and to others, and was not patentable, have not been overlooked. But, as neither of these structures or patents contain the combination of the first claim of McQueen, it does not contain the combination of the elements of that claim and the additional elements of the tie walls and spaces for the elevator legs described in the second claim. The question is not whether or not the tie walls and the spaces for the elevator legs were anticipated or patentable considered by themselves, but whether or not the combination of them with the combination of the elements of the first claim was patentable, and the court is not persuaded that it was not.

[7] It is not unwise at times to recur to the nature, object, and effect of a patent, to call to mind the facts that it arises out of an offer of the United States to warrant to an inventor, in consideration of his making, reducing to practice, and giving to the public a new and valuable invention forever after, the exclusive right to use and vend it for a few years, that this offer must be followed by an acceptance by the inventor, not by words, but by the actual making, publishing, and reducing to beneficial use of such an invention and by proof thereof to the satisfaction of the United States before the patent can issue; that the patent, when issued, is the written evidence that such proof has been made to the satisfaction of the United States, and also of a contract of the United States to the effect that during the term of the patent it will secure to the patentee the exclusive right to vend and use the machine, device, or combination described and claimed in his patent. It is one of the fundamental rules for the interpretation of contracts and grants that, in case of doubt or ambiguity, that construction should be preferred which sustains and vitalizes, rather than that which strikes down and paralyzes. Reece Button-Hole Machine Co. v. Globe Button-Hole Machine Co., 61 Fed. 958, 962, 10 C. C. A. 194; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 712, 45 C. C. A. 544.

[8] It is also well to remember that such a patent or contract, and the enforcement of it, take nothing from those who are not parties to it. They have the same right and freedom to use all the devices and improvements that were known and available to them before the invention or discovery was made and patented, that they had before the patent was issued. For example, if the defendants think that any

of the devices or improvements or combinations disclosed in any of the numerous patents, publications, or structures they have introduced in evidence as anticipating the combinations patented to McQueen are equivalent or preferable to his, they may still use those, notwithstanding his patent, so that the enforcement of McQueen's patent contract cannot injure them, while the failure to enforce it deprives him of a part at least of the benefits warranted to him by the patent. The conclusion of the whole matter is that in the gradual advance of the art, to which reference has been made, the patentee McQueen was the first and original inventor of the novel and useful combinations described in his patent and claimed in the first and second claims thereof, that the defendant infringed these claims, and that the decree below must be affirmed.

It is so ordered.

(257 Fed. 314)

ALVEY-FERGUSON CO. v. PETER SCHOENHOFEN BREWING CO.

PETER SCHOENHOFEN BREWING CO. v. ALVEY-FERGUSON CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

Nos. 2586, 2589.

1. PATENTS ⟹328—VALIDITY—CONVEYER.
   The Alvey-Ferguson patent, No. 790,776, claims 7 and 8, for a conveyer, which discloses merely a joint use of two previously known elements, *held* void for want of invention.

2. PATENTS ⟹328—VALIDITY—ELEVATOR.
   The Alvey patent, No. 790,811, claims 1, 2, 3, 10, and 11, for an elevator for packages, *held* not anticipated and valid.

Appeals from the District Court of the United States for the Northern Division of the Southern District of Illinois.

Suit by the Alvey-Ferguson Company against the Peter Schoenhofen Brewing Company for infringement of two patents. From a decree (245 Fed. 762) dismissing the bill as to one patent, and granting relief to complainant as to the other patent, both parties appeal. Affirmed.

John W. Hill, of Chicago, Ill., for plaintiff.
Frank T. Brown, of Chicago, Ill., for defendant.

Before BAKER and MACK, Circuit Judges, and CARPENTER, District Judge.

MACK, Circuit Judge. Each party has appealed from that part of a decree which denies its contentions, in adjudging claims 7 and 8 in letters patent 790,776 invalid, and therefore dismissing the bill as to these claims, and in adjudging claims 1, 2, 3, 10, and 11 of letters patent No. 790,811 valid and infringed, and therefore granting the in-

junction as prayed in respect to them. Both patents were granted to Benjamin H. Alvey and assigned to the plaintiff, Alvey-Ferguson Company.

Patent No. 790,776 Conveyer.

Claim 7 reads as follows:

7. The herein described means for conveying articles from one room to the lower portion of the room below the same, comprising a spiral way which has its upper terminal in the lower room and a supplemental conveyer or slide for discharging articles upon the upper portion of said spiral way, said supplemental conveyer or slide extending off from the upper portion of said spiral way at an inclination upward therefrom, through an opening which is located at one side of said way and in the floor of the room above that containing said way, whereby the necessity of an opening in the floor for said spiral way is avoided.

Claim 8 differs from it only in describing the supplemental conveyer as detachable. Clearly the alleged invention of this patent is not that of a system. Nor is it described, as is the invention of the other patent, as forming part of a system. If the two patents together, or with other patents secured by Alvey, cover a conveyer system, pioneer or otherwise, that fact has no bearing on the validity of the claims in the patent in suit. That patent or rather the claims in suit must stand or fall independently of any others.

This patent relates, then, not to a general conveying system, not to an elevating of goods from one floor to another, but, as the patentee stated in his application, to the lowering of boxes, barrels, or other articles from one elevation to another by the force of gravity. The claims in suit are limited to the means for carrying articles from one floor to the next lower floor.

Each of these means, the spiral chute and the supplemental conveyer, was in itself old. The spiral way permits of a gentler inclination, and thus is a safer means of conveying fragile articles than a straight chute would be. The use of a straight slide running through the floor cut, instead of a continuous spiral, saves floor space, and, if detachable, it permits of the closing of the floor opening, whenever desired.

If, as plaintiff contends, the spiral way, though not specifically described in these two claims, is to be limited to one with a roller or some equivalent bed, and not to include a plain slide conveyer, because only the former is adapted to accomplish the stated object of uniform speed and a minimum of friction, there is nevertheless no novelty in it. In Alvey's own earlier patent No. 714,432, the bed of the conveyer was formed of rollers.

Each of the alleged advantages and functions pertains to one or the other of the two elements. No additional advantage is derived from their union. Whether the measure of co-operation in the successive action involved in the use of the two elements united saves the alleged invention from the charge of being a mere aggregation of elements, it is unnecessary to determine; for the conception of their joint use, even if novel, involves, in our judgment, no inventive thought.

Moreover, in Alvey's earlier patent, the conveyer, while Z-shaped,

or serpentine, instead of spiral—the latter was well known, Warner patent No. 380,707—is shown "in Fig. 1 as adapted to receive packages from an upper floor through an opening and chute." It is immaterial whether or not that chute is, as it there appears to be, detachable. The united action of the chute and conveyer is clearly represented. The substitution of a detachable chute or of a spiral conveyer or both involves no invention.

Patent No. 790,811 Elevator.

The claims in issue read as follows:

1. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an inclination with its said end portions and gradually merging into the same, rollers constituting a portion of the track or way, a stationary portion arranged at the junction of an end and intermediate portion of the frame, and traveling means for conducting the articles upward along said track or way.

2. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an inclination with its said end portion and gradually merging into the same, rollers constituting a portion of the track or way, a stationary portion arranged at the junction of an end and intermediate portion of the frame, means for conducting the articles upward along said track or way, and conveying means for conducting said articles to and from said elevator.

3. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an angle with its said end portions and gradually merging into the same, a frame arranged at the junction of an end portion and said intermediate part and forming part of the track or way, rollers arranged to form a part of said track or way, a pair of connected endless belts for conducting the articles along said track or way, and means for holding said belts down adjacent to the junction of said end and intermediate portions.

10. An elevator comprising a frame having a track or way provided with rollers, upon which rollers travel the articles being conveyed, and a traveling conveying means having roller flights which are arranged above the first-mentioned rollers and engage the sides of said articles and push the same along said track or way.

11. An elevator comprising a frame, composed of side members and a track or way between said side members, said track or way having rollers upon which travel the articles being conveyed, and a traveling conveying means, comprising endless belts guided by said side members and independently rotatable flights or carriers connecting said belts with each other and traveling above said rollers and engaging the sides of the articles being conveyed.

Unlike the invention of the other patent, this elevator is specifically described as one "adapted to be used in systems of handling packages whereby packages may be most expeditiously and safely elevated from one floor to another of a warehouse" and as "adapted to form part of a conveying system wherein the packages are conveyed to it by a gravity conveyer which runs around or through the room and delivered by it to a similar gravity conveyer which runs around or through the room above."

The function of this power driven elevator is to raise packages including those of a fragile or breakable character safely, reliably and automatically from a lower to a higher gravity section or conveyer, with a minimum of manual attendance. The novelty in the construction of the elevator way is that it has only in part rotatable rollers;

a stationary or slide portion is substituted for rollers at a point intermediate the bottom horizontal end portion and the inclined portion.

Defendant at first had an all-roller way. The defendant, in a case in which Judge Veeder in the District Court for the Eastern District of New York (Alvey-Ferguson Co. v. John F. Trommer Evergreen Brewery, 260 Fed. 372) enjoined infringement of the only claims there in issue, 1, 2, 3, originally had an all-slide way; both defendants paid plaintiff the tribute of imitation by substituting for an unworkable structure its combined roller and slide way.

Berger, No. 391,223, chain conveyer for handling coal, bridged over the angle between the horizontal and inclined portions of the structure and avoided the danger of obstructions by rounding that break. But the structure is of a totally different kind and in no sense shows the combination of claims 1, 2, and 3; there is no roller portion and stationary portion, each forming part of the track; there are no traveling means for conducting articles over such a track. This combination of roller and stationary portions not merely prevents clogging, but it secures the elevation with a minimum of friction and danger of interruption through breakdown or accidental stopping. The elevator so composed is unitary in its operation; the parts co-operate to effectuate a useful purpose; the conception of such a combination was both useful and novel.

Moore, No. 252,960, machinery for laying railway tracks, uses a series of cars, each provided with an adjustable roller way on each side. He specifies that "the ties are pushed along over the rollers by men with spiked poles" and that "as the ways slope toward the front the ties begin to move forward, or will do so with slight help," until they reach the forward car, which is provided with an endless chain; this carries the ties forward and drops them over the front end. This structure is not an elevator, but a roller skid, down which rails and ties may be drawn. In no sense does it disclose the combination of claims 10 and 11.

Neither Friedman, No. 540,970, apparatus for conveying rolling packages, nor Baker, No. 668,079, conveyer, indicate plaintiff's rotatably mounted flights or carriers and their function. Plaintiff specifies that they "engage the packages to be elevated and are adapted freely to disengage themselves from packages which are not properly engaged therewith. Thus when, as frequently happens, at the receiving end of the device, a package instead of being in its proper position comes directly onto said flight, it is not dragged part way around the sprockets or onto the carrier, and then allowed to fall back, but, on the contrary, the roller turns freely on its shaft and travels from beneath said package without elevating the same and leaves it at the foot of the elevator in position to be properly engaged by the next succeeding flight."

Baker's arm is not a roller; it is merely a rounded support with or without a small roller at the top, likewise acting only as a support. In either case, the arm operates as a pusher only at the top of the incline, and there it either throws the package forward, instead of merely

gently moving it, or it passes under the package and allows it to fall back to its original position with a shock.

Friedman's roller has an entirely different function, to enable a barrel to be pitched while being rolled up an incline. It is adaptable only to barrels, and not to other packages. It rolls the barrel off the conveyer.

Plaintiff's rollers on the crossbars have the sole function of so moving packages not properly placed on the elevator that the next flight will properly engage them. The roller, in passing under the package, moves it slightly forward without danger to the package. They act thus in co-operation with the other parts of the structure, and produce a combination both useful and novel.

Infringement is practically conceded, if validity of the claims is established. The slight differences in detail are immaterial as to the claims in issue.

Decree affirmed.

(257 Fed. 318)

MUNSON MFG. CO. v. DEERE & CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2614.

PATENTS ⟹328—VALIDITY AND INFRINGEMENT—REVOLVING CLOD FENDER.

Munson patent, No. 1,025,420, claims 1 and 4, for an improved revolving clod fender for use with a corn cultivator, *held* not anticipated and valid, and infringed by a device of similar shape and operation, but constructed of malleable castings, instead of wire, as described in the claims.

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois.

Suit by the Munson Manufacturing Company, a partnership, against Deere & Co., a corporation, for infringement of patent No. 1,025,420. From a decree dismissing complainant's bill, complainant appeals. Reversed, with instructions to enter decree for complainant.

W. R. Bair, for appellant.

Albert H. Adams, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. The patent to Munson, No. 1,025,420, covering a "revolving clod fender," describes a device attached to a corn cultivator standing between the cultivator shovels and the plants; its function being to permit a quantity of fine earth to roll up close to and around, but not covering, the plants.

There have been two kinds of clod fenders—one, the stationary kind, consisting ordinarily of metal sheets interposed between the shovel and the plants; the other, to which appellant's device belongs, is known as the rotary clod fender. These fenders are disc-shaped devices formed with toothed or serrated edges and designed to turn on their axes by reason of the contact of the edge with the earth. The prior art con-

tained such fenders with openings or slots through which some fine earth could pass. The following illustrations will show types used prior to Munson's patent:

Fig. 1.

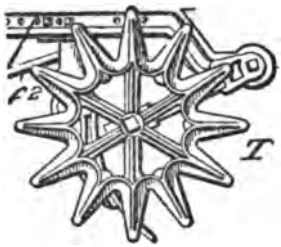

Fig. 2.

Fig. 3.

Fig. 4

The two claims in suit are 1 and 4, and they read as follows:

(1) A revolving clod fender, comprising a suitable hub and spokes radiating therefrom, said spokes being formed of looped wire secured to the hub at their open ends.

(4) In combination with a cultivator having spaced beams, stems fixed at their forward ends to said beams, said stems converging rearwardly and bent into parallel planes at their rear end portions, pivot bolts in rear end portions of said stems, and revolving clod fenders mounted on said pivot bolts and spaced apart, said fenders comprising radiating spokes of looped wire clamped together at their open ends.

That such slight changes would produce new results or new functions might well seem, on first impression, questionable.

It is claimed, however, and the evidence seems to support the claim, that the fender with the loop structure made it possible for the operator to better loosen the ground, and put the dirt close to and around the stalks of corn and at the same time quite effectively prevent the covering of the young plants.

More specifically, it was claimed that the fine earth is piled up around the stalks; that the loops which have been imbedded in the fine earth by reason of the operation of the shovels carry some of the earth upward and toward the plants; that where the plants, for some reason are knocked to one side by the dirt, the loops in the clod fender draw the leaves of the plant out from under the dirt, thereby avoiding stops by the operator to uncover the plants.

The evidence shows that plaintiff's device went into immediate and extensive use. While this may have been in part a matter of advertising and the result of appellant's energy in pushing its product on the market, it was not necessarily or entirely so. Appellee's experience confirms appellant's claims. It used rotating fenders in the early eighties and sold many between the years 1885 and 1890. Thereafter the rotating fender went out of the market and was not again used until 1916, when appellant's device came into use. Thereupon appellee, having the merits of the fender fully set forth to it by Munson, provided some of its cultivators with the infringing device, and its use by appellee multiplied with surprising rapidity.

The best prior art citations are Hench (Fig. 2), Eisenhart (Fig. 1),

and Allison (Fig. 3). Eisenhart's patent deals with cultivators, a fender merely being shown in the drawings. The patent to Hench also deals with improvements in cultivators; the disclosed fender being quite similar to the one which appellee adopted and later discarded. The Allison patent covered a fender (see Fig. 3), the claim being as follows:

"The arrangement of the rotary perforated clod guards *n n* combined with the plows *b b*, and beams *D D*, constructed and operating as herein set forth."

In his specifications Allison says:

"On the inside of each of the inside plows *b b*, I place clod guards, *n n*, which are little wheels suspended by rods *p p* to the plow beams, and made with spokes or open lattice work of any kind, to allow the finer soil to sift through as they travel alongside of the plows when at work, while the larger clods are turned aside and prevented from being thrown upon the young plants."

Appellant's assignor did not, of course, patent a revolving clod fender as such, but merely the specific construction or fender described in the claims quoted above.

The file wrapper does not detract from the force of appellant's claims. The first claims filed were too broad and were rejected. Present claims 1 and 2 and others were then presented, and the examiner rejected original claim 4, because completely covered by present claim 1, stating that—

"Any novelty in the claim resides in the specific construction of the fender."

With this ruling claimant acquiesced. In this we find nothing inconsistent with appellant's present asserted position. We conclude both claims are valid.

Noninfringement.—Appellee bases its defense of noninfringement upon the use of the word "wire" in the two claims involved. That its infringing fender otherwise responds to the claims in question is not open to dispute.

Herewith is presented a figure of appellee's fender, with each alternate loop removed and loops taken from the Munson clod fender substituted.

Grant appellant's invention is not a pioneer, and his claims are limited, and that he deals merely with an improvement in a revolving fender, yet a fair application of the doctrine of mechanical equivalents, we think, compels us to include appellee's structure. With appellant's device before it, with its merits and advantages fully explained by a representative of the Munson Manufacturing Company, appellee constructed a fender which, outside of the material and the way it was made, is in all respects similar to appellant's fender. Appellee, however, makes its fender of malleable castings.

Although using the word "wire" in its claim, the patentee should not be restricted to this material, nor should appellee be permitted to escape infringement by reason of the substitution of malleable castings for wire. While the substitution of different materials may, under certain circumstances, avoid infringement by the user, such a conclusion could not well be reached in the present case. All the previously used revolving fenders were made of metal, some of steel, some of malleable castings. In the prior art citations of the Patent Office were revolving wire fenders. The novelty could not be said then to lie in the metal. The problem which Munson successfully attacked was solvable, not by the use of a particular metal, but by the construction of the loops. We think infringement is shown.

The decree is reversed, with costs, with instructions to enter a decree in complainant's favor for an injunction and an accounting.

(257 Fed. 321)

ROSEMARY MFG. CO. v. HALIFAX COTTON MILLS, Inc.

(Circuit Court of Appeals, Fourth Circuit. January 7, 1919.)

No. 1647.

PATENTS ⟹328—VALIDITY—POWER LOOM.

The Patterson reissue patent, No. 12,159 (original No. 722,243), for power loom, *held* void, as claiming broadly a combination of Jacquard mechanism with a plain power loom equipped with an automatic weft-replenishing device, which was not the patentee's invention.

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Suit in equity by the Rosemary Manufacturing Company against the Halifax Cotton Mills, Incorporated. Decree for defendant, and complainant appeals. Affirmed.

William W. Dodge, of Washington, D. C., and Robert Fletcher Rogers, of New York City (Caskie & Caskie, of Lynchburg, Va., on the brief), for appellant.

Melville Church, of Washington, D. C. (Titian W. Johnson, of Washington, D. C., and Coleman, Easley & Coleman, of Lynchburg, Va., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The plaintiff, the Rosemary Manufacturing Company, is the owner of reissued letters patent No. 12,159, granted September 29, 1903, to Samuel F. Patterson. It charges infringement by the defendant, the Halifax Cotton Mills, Incorporated. The lower court dismissed its bill, and it has appealed.

If the patent is valid, its claims can be read upon the looms used by the defendant. The latter, however, denies validity, and in the alternative says it has a license. In the view we take of the first con-

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tention, it is unnecessary to consider the second. In substance the claims are for a combination of Jacquard mechanism with a plain power loom equipped with automatic devices for replenishing or renewing the weft thread. The plain hand loom is milleniums old. More than a century has elapsed since men found how it might be driven by steam. The invention of Jacquard was made a hundred years or more ago, and for that length of time the combination of the Jacquard mechanism with the plain power loom has been in general use. As early as 1834 it was perceived that such a combination as the plaintiff now claims would be a great improvement in the art. In the year mentioned two British inventors obtained a patent for a loom which they thought embodied it. In point of fact their device did not work, and their machine does not anticipate the plaintiff's.

In many inventions there are two distinct steps: First, the conception of the general result wished for; second, the discovery of a way of obtaining it. In a large majority of cases, perhaps, the first may be obvious to every one interested in a particular art, and it is the second which calls for the exercise of inventive genius. But that is not always so. It may well be that two or more machines, appliances, or tools are old and well known. Some day it dawns on some one that, if they are combined, new and useful results will be obtained. It may be that, so soon as the advantages of the combination are understood, the means of bringing it about are within the capacity of any fairly skilled mechanic. In a third class of cases inventive genius may be required both in perceiving the combination that is desirable, and in finding out a practical way of making it.

In applying these platitudes to the instant case it will be seen that there is nothing new in Patterson's idea that the combination claimed by him would be useful. That was then at least 65 years old. All the greater would be the presumption of invention in one who after such a length of time found the way to attain the end. One who so succeeded could, it is true, not claim a monopoly of the combination, however brought about, because the conception of that combination was not his contribution to the art. But he would be entitled, not only to a patent for his way of making that combination workable, but also to an extremely liberal construction of his claim, so as to cover a broad range of equivalents. Unfortunately Patterson's claims are in fact for the combination, no matter how effected, and of that he was not the inventor. It is true that some of these claims apparently go somewhat into detail; but the patent does not clearly tell us in what the invention lies, unless it is in the combination, nor have we been able to discover in what other than such combination it is supposed to be found, although we have had the benefit of the testimony of highly qualified experts and of the briefs and oral arguments of able and experienced counsel.

The patent law requires the patentee to tell in what his invention consists. This is the rule, which we may not relax, even if we would; but this is a case which from every standpoint calls for its reasonable application. Why, after the desirability of the combination was perceived, did two-thirds of a century pass before it was effected. The

record shows that for 61 out of the 65 years no one knew how to supply one of the elements. It was not until 1895 that in the Draper-Northrop loom the world first saw an automatic weft-replenishing device successfully applied to even a plain power loom. Some years elapsed before its merits were fully recognized, and in 1899 Patterson says he conceived his invention. At that day all that was open to his appropriation was the method by which he successfully combined the new Draper-Northrop loom with the old Jacquard. If he had limited his claims to the way or ways in which he had achieved this end, the court and the public would have been able to say whether invention was displayed in what he did. In passing on that question he would have been entitled to whatever favorable presumptions were raised by the admitted success of his loom and the use of it by the defendant. As it is, his claims call for more than was open to his monopolization, and are in consequence invalid.

Affirmed.

(257 Fed. 323)

JACKSON v. ENID FOUNDRY & MACHINE SHOPS et al.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919.)

No. 5151.

PATENTS ⟹328—NOVELTY—METER BOX.

The Jackson patent, No. 1,038,146, for meter box, *held* void for lack of novelty, in view of prior structures in analogous arts.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit in equity by John T. Jackson against the Enid Foundry & Machine Shops and others. Decree for defendants, and complainant appeals. Affirmed.

G. A. Paul, of Oklahoma City, Okl., and F. R. Cornwall, of St. Louis, Mo., for appellant.

Harry O. Glasser, of Enid, Okl., for appellees.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This is a suit for infringement of patent No. 1,038,146, September 10, 1912, to John T. Jackson, for improvements in meter boxes. The trial court held the patent invalid for want of novelty, and the plaintiff appealed.

The structure described in the patent is composed of separate cast iron side and end members easily transportable in "knock-down" condition, and also arranged to be readily assembled and fastened for use in housing underground water meters, etc. It has no bottom, and the lid or cover is not in controversy. In setting up the box, the ends slip into grooves formed by ribs integral with and along each

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

perpendicular edge of the side pieces. The inner ribs are not continuous, but are broken near the top and bottom, so as to form recesses to accommodate lugs protruding from the end pieces and to allow them to lie close to the face of the sides. Ordinary stove bolts are passed through the lugs and corresponding holes in the sides. "The inner ribs prevent the end walls from moving inwardly, the outer ribs prevent the end walls from moving outwardly, and the bolts hold the walls together, so that they cannot be accidentally displaced." It was said by an expert for plaintiff that the essence of the invention consisted in the seating of the ribs at the corners of the box forming the grooved joint, with the lug out of contact with the inner rib, but in flat contact with the side walls.

We agree with the trial court that the structure was old in the analogous art of fire boxes of the ordinary domestic stoves. Aside from an old catalogue and physical exhibits received in evidence, common experience and observation teaches us that for very many years the sides and ends of fire boxes in heating and cooking stoves were made stable in practically the same way. In preventing the inward fall or movement of the ends of his meter boxes, plaintiff's noncontinuous or so-called recessed inner ribs of the sides perform in the same way the same function as the familiar lugs or shoulders of fire boxes, and the latter likewise accommodate the bolting device. Of course, the exterior or outside ribs or projections to prevent the cornering walls from falling outwardly were old in various forms.

The decree is affirmed.

(257 Fed. 369)

ACKERMAN et al. v. SANTA ROSA-VALLEJO TANNING CO.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3230.

1. SALES ⟹174—BREACH BY BUYERS—RIGHT TO INSIST SELLER SHOULD HAVE PERFORMED.

Where the seller of leather backs shipped an installment in accordance with the contract, and three days after payment for the installment was due the buyers announced their intention to continue to hold back payment until the order was completed, the seller had a right to stand on the terms of the contract and refuse performance until the buyers themselves performed, and the latter, having failed to comply with the terms of payment, cannot insist the seller should have proceeded and completed the contract in the manner specified.

2. SALES ⟹179(4)—DELAYED ACCEPTANCE OF GOODS—WAIVER OF DEFECTS AND CONTRACT REQUIREMENTS.

Delayed acceptance by the buyers of goods once rejected was a waiver of defects and of contract requirements as to quality of the merchandise.

3. SALES ⟹82(1)—CONSTRUCTION OF CONTRACT—PAYMENT.

A contract for the sale of leather backs, reading, as to payment, "2%—30 days f. o. b. Vallejo," required payment within 30 days of the date of shipment from the seller's tannery, and, if paid sooner, called for a deduction of 2 per cent.

4. SALES ⟹54—TIME AS OF ESSENCE.

As a rule, the parties to mercantile agreements, as contracts of sale between dealers, are held to have intended to make time the essence of the contract.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Robert S. Bean, Judge.

Action by J. E. Ackerman and Max Brummel, individually and as copartners doing business under the firm name and style of Ackerman & Brummel, and Ackerman & Brummel, a copartnership, against the Santa Rosa-Vallejo Tanning Company. To review a judgment for defendant, plaintiffs bring error. Affirmed.

This is an action on a contract for purchase and sale of leather backs. The cause was tried without a jury. Findings and conclusions were made in favor of the tanning company, defendant in error. Ackerman & Brummel, plaintiffs in error, brought writ of error.

The contract in question was entered into December 16, 1915, and is in the form of a letter addressed to Ackerman & Brummel, and signed by the Santa Rosa-Vallejo Tanning Company, per E. W. Hurgren, president. By the terms of the contract the tanning company agreed to sell, and Ackerman & Brummel agreed to buy, 1,000 sole leather backs, with an option of 2,000 additional at $41.50 per 100 pounds "less 2 per cent. f. o. b. Vallejo—30 days date of arrival Boston." On August 12, 1916, through correspondence the terms of the contract were changed so as to read "2 per cent.—30 days f. o. b. tannery." On March 3, 1916, the tanning company invoiced and shipped to Ackerman & Brummel 1,000 sides of leather. On August 23d, an invoice of 255 sides was issued by the tanning company and contained the words: "Terms: 2%—30 days f. o. b. Vallejo." No other shipments were made. In a letter dated September 12th, addressed by the Tanning Company to N. W. & A. L. Friedman, who were the representatives of Ackerman & Brummel at San Francisco, the

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tanning company advised Friedman that another shipment of leather was ready for delivery, and requested Friedman to be in Vallejo to receive the leather on the date of the shipment. Friedman went to Vallejo, and on his return to San Francisco on September 15, 1916, wrote to the tanning company that the leather inspected did not meet the specifications provided for under the contract, and that it was necessary to reject the same. A few days later, September 18th, Friedman again wrote the tanning company, offering to find a market for the rejected leather at 43 cents a pound; but the tanning company refused the offer, and on September 19th telegraphed to Ackerman & Brummel at Boston as follows: "Had shipment leather ready last Friday. As matter of courtesy asked Mr. Friedman to inspect same before shipment. He examined part of lot and said it was not satisfactory. We insist it is up to requirements in all respects. To avoid delay and future difficulties please name another representative here to inspect the shipment. Advise by wire your wishes."

Ackerman & Brummel, under date of September 20th, wrote the tanning company, acknowledging receipt of the telegram, and saying the matter must be left in the hands of Friedman to pass upon the shipment. Five days afterwards, September 25th, Ackerman & Brummel, by letter to the tanning company, acknowledged receipt of the leather invoiced on August 23d and said: "We have had such an exceptional amount of trouble in securing this leather from you that we propose to hold back payment on this bill until you make another shipment, and as soon as we receive the other shipment we will pay you this bill immediately, and will continue to follow this mode of payment until your order is completed." The August shipment was invoiced on the 23d of that month, and the leather was shipped on the 22d. On September 25th, Friedman wrote the tanning company to the effect that he had received a communication from Ackerman & Brummel, inclosing a copy of their letter to the tanning company, and expressing regret that he (Friedman) was unable to accept the last shipment of leather. The next day the tanning company wrote to Friedman, acknowledging receipt of a letter of September 20th from Ackerman & Brummel, in which they had referred to the acceptance and rejection of the leather by Friedman. In this letter the tanning company asked a re-examination and acceptance of the leather, and stated that it fully met all requirements of the agreement.

On September 27th Friedman again wrote to the tanning company, stating that the leather was not of the proper quality and color, and on the following day the tanning company replied, insisting that it was in accordance with the terms of the agreement. On October 9th the tanning company wrote Ackerman & Brummel, acknowledging receipt of their letter of September 25th, already quoted from, in which Ackerman & Brummel notified the tanning company that they intended to hold back the payment on that and other bills. In the letter of October 9th was a statement that, if the money due for the August shipment was not paid without further delay, suit and attachment for the full amount due and damages would be brought. The letter continued as follows: "The 'other shipment' which you mention was, as you know, repeatedly tendered by us in accordance with our contract and was by you rejected. We feel that your course in this matter is prompted by a disposition to take an advantage. You have rejected leather which is fully up to the contract, and you now, without any excuse therefor, arbitrarily refuse to pay us for the consignment which you received and which you concede is of the quality called for. We cannot tolerate such defiance of the terms of your contract, and we propose to insist upon prompt payment in accordance with the terms of your agreement." On October 11th Friedman wrote to the tanning company as follows: "* * * As long as the leather for Ackerman & Brummel is ready for shipment, go right ahead and tie it up and ship it at the earliest possible date." The last correspondence had between the parties was dated October 13th, a letter by the tanning company to Friedman, wherein the tanning company accuses Ackerman & Brummel of having refused to accept leather complying with the terms of the contract, and of having refused to pay for each consignment within 30 days after shipment from Vallejo.

Wise & O'Connor, Otto Irving Wise, Richard S. Goldman, and John C. Altman, all of San Francisco, Cal., for plaintiffs in error.

John L. McNab and Byron Coleman, both of San Francisco, Cal., for defendant in Error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The theory of the plaintiffs in error is that the tanning company refused to comply with the directions of Friedman, made after the second inspection, to ship the leather at once, and that by refusal to carry out such request, or to deliver any other backs until the shipment of 255 backs had been paid for, it followed that the tanning company broke the contract and became liable for damages for a breach. The argument is that a failure to pay an installment due under the terms of a contract does not avoid the entire contract, or constitute a breach, unless by express terms such failure to pay is made a ground for the termination of the contract, and Cox v. McLaughlin, 54 Cal. 605, is the main decision relied upon. There a contractor brought action for damages for breach of contract for erecting a building, and alleged failure to pay certain installments due under the contract at the time provided for. The court held that such failure did not give plaintiff right to terminate the contract and sue for damages for its entire breach. Upon a later appeal of the same case (Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164) it was held that the contractor could amend and recover upon a quantum meruit for labor and material furnished, but could not maintain action for damages for breach of the entire contract. Under the later cases in California the earlier decision in Cox v. McLaughlin, supra, is regarded as holding that a mere refusal to pay an installment upon the contract price of an article as it becomes due does not authorize the plaintiff to abandon the work and recover the profits he would have made if the work had been completed under the contract. Woodruff Co. v. Exchange Realty Co., 21 Cal. App. 607, 132 Pac. 598; Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 Pac. 146.

In the recent case of Jensen v. Goss (Cal. App.) 179 Pac. 225, the parties made a contract for purchase and sale of hay, payments to be made on the 13th of each month following delivery. The buyer failed to make the payments as agreed, and the seller refused to deliver. The court held that the seller of the hay was justified in rescinding the contract, when it was shown that there was a clear intention to violate its provisions and to withhold payments due until the delivery of more hay. Minaker v. California Canneries Co., 138 Cal. 239, 71 Pac. 110, was cited to support the rule that plaintiff could not offset any damages for alleged breach by refusal to pay on the ground of a failure to deliver the quality of hay required by the contract without showing performance on his own part of his own agreement. The court said:

"It was just as important that payments should be made as agreed upon as it was that deliveries should be made according to the contract, and when

one of the parties flatly declared that it would not pay as agreed, the other party had the right to refuse to further deliver."

[1, 2] By the application of these rules, Ackerman & Brummel first defaulted, for on August 22d the tanning company shipped 255 backs of leather in accordance with the terms of the contract, and invoices were mailed on August 23d, and receipt of the consignment was acknowledged on September 25th. The modified contract, as to terms of payment, was made before the leather was shipped; hence payment was due September 22d, or 30 days after shipment from the tannery. It was on September 25th, however, that Ackerman & Brummel wrote the letter quoted, refusing to carry out the terms of the contract, and announcing their intention to continue to hold back payment until the order was completed. The situation gave to the tanning company the right to stand upon the terms of the contract and to refuse performance until the terms thereof were lived up to. The delayed acceptance by the buyers of the leather that had been once rejected was a waiver of defects in the leather, and of contract requirements as to the quality of the merchandise, and Ackerman & Brummel, having failed to comply with the terms of payment, are not in a position to insist that the tanning company should have proceeded and completed the contract in the manner specified. San Francisco Bridge Co. v. Dumbarton Land, etc., Co., 119 Cal. 272, 51 Pac. 335.

[3, 4] In what we have said we construe the mode of payment stated in the contract, "2%—30 days f. o. b. tannery," to require payment within 30 days of the date of shipment from the tannery, and if paid sooner than the expiration of the 30 days a deduction of 2 per cent. was to be made. Such a construction usually obtains in respect to mercantile agreements where, as a rule, the parties are held to have intended to make time the essence of the contract. Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Jensen v. Goss, supra.

We think the District Court was right in its findings, and that its legal conclusion should be sustained.

Affirmed.

(257 Fed. 372)

UNITED STATES v. WARD et al. (two cases). SAME v. BRAINERD et al. SAME v. MATTHEWS et al.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1919.)

Nos. 5223–5226.

1. BANKRUPTCY ⟹230—REFEREES—LIABILITY ON OFFICIAL BOND.

Where a referee has collected from parties or estates in bankruptcy proceedings moneys as compensation to which he is not legally entitled, and these fees have been collected or withheld from parties who are numerous, and the individual amounts small, the United States may maintain a single action on his bond, on behalf of all parties injured, to recover back such illegal fees.

2. BANKRUPTCY ⟹230—ACTION ON REFEREE'S BOND—COMPLAINT—NAMING OF USE PLAINTIFFS.

In an action by the United States on the official bond of a referee in bankruptcy, on behalf of numerous parties from whom he has collected

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illegal fees, it is not necessary that all such parties should be named in the complaint.

3. BANKRUPTCY ⟹223—REFEREES—COMPENSATION.
Where a duty is imposed upon a referee by the bankruptcy law, and compensation is also fixed for its performance, the bankruptcy court has no power or authority to allow any further compensation.

4. BANKRUPTCY ⟹223—REFEREES—COMPENSATION.
Where a duty is clearly imposed by the bankruptcy law upon a referee, and no specific compensation is fixed for its performance, the compensation expressly authorized by the law as a whole is the only compensation which he can receive, or that the court has power to allow.

5. BANKRUPTCY ⟹230—REFEREES—ACTION TO RECOVER FEES ILLEGALLY COLLECTED—EFFECT OF ALLOWANCE BY COURT.
A court of bankruptcy being without jurisdiction to allow a referee under any form or guise any other or further compensation than expressly authorized and prescribed by the bankruptcy law, such allowance, if made, does not bar an action for its recovery.

6. BANKRUPTCY ⟹223—ALLOWANCE OF EXPENSES TO OFFICERS—REVIEW.
An allowance by a court of bankruptcy of necessary expenses incurred by officers in administration of estates, which under Bankruptcy Act July 1, 1898, § 62 (Comp. St. § 9646), is within the power of the court, is not subject to collateral attack, but can only be reviewed by direct proceedings.

7. BANKRUPTCY ⟹223, 224—POWERS OF BANKRUPTCY COURT—APPOINTMENT OF SPECIAL MASTERS.
A court of bankruptcy may, in the exercise of a sound discretion, refer issues to special masters, and may name a referee as such special master, and his fees and expenses as such are within the control of the court, and its judgment in such matters is not subject to collateral attack.

8. BANKRUPTCY ⟹223—POWERS OF BANKRUPTCY COURT—EXPENSE ALLOWANCE TO REFEREES.
A court of bankruptcy may authorize a referee to employ a clerk and allow an expense for stationery, office rent, light, heat, and phone, and such authorizations may be made by standing rule or order, or by special order in any particular case.

9. BANKRUPTCY ⟹230—REFEREES—ACTION TO RECOVER FEES ILLEGALLY COLLECTED—"JUDICIAL ACT."
The taking of fees by a referee in excess of those prescribed by the statute is not a "judicial act," and as such protected from an action for an accounting.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Act.]

10. BANKRUPTCY ⟹230—REFEREES—LIABILITY OF SURETIES.
Sureties on the bond of a referee conditioned for the faithful performance of his official duties are liable for fees illegally collected or retained by him.

11. JUDGES ⟹24—"JUDICIAL ACT."
A "judicial act" is an act of a court or magistrate in deciding a question of right litigated before him or referred by law to his judgment.

In Error to the District Court of the United States for the Eastern District of Oklahoma; John C. Pollock, Judge.

Actions by the United States against W. T. Ward and others (two cases), against Ezra Brainerd, Jr., and others, and against R. H. Matthews and others. Judgments for defendants, and the United States brings error. Reversed.

For opinion below, see 250 Fed. 1011.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Alvin F. Molony, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

J. L. Hull, of Muskogee, Okl., and H. C. Thurman, of Oklahoma City, Okl. (N. A. Gibson and T. L. Gibson, both of Muskogee, Okl., and J. H. Gordon and E. E. McInnis, both of McAlester, Okl., and J. S. Ross, of Oklahoma City, Okl., on the brief), for defendants in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. These are suits on bonds of referees in bankruptcy to recover fees, costs, commissions, and compensation alleged to have been illegally collected and received by them in excess of the amount allowed by law. They were brought by the United States on its own behalf and on behalf of various suitors and parties interested in the administration of bankrupt estates. The defendants in each case are the referees and the sureties on their official bonds. The items for which a recovery is sought are stated in detail in exhibits attached to the complaints. These items may be grouped under three heads: (1) Services for which the bankruptcy law fixes the compensation. (2) Services for which the compensation is fixed by the United States District Court. (3) Costs and expenses allowed by said court.

[1] The defendants filed general demurrers, which were sustained. The United States electing to stand on its complaints, judgments dismissing the same followed. The condition of each bond sued upon was for the faithful performance of the official duties of the respective referees. The United States was the obligee, and the law provides that the bond may be sued upon, in the name of the United States for the use of any person injured by a breach of its condition. In our opinion, Congress intended that the bond should protect private individuals as well as the United States. The requirement that referees in bankruptcy should execute a bond for the faithful performance of their duties was an assurance to persons interested that, within the penalty of any bond taken from them by the United States their rights would be protected against any act or omission on the part of referees resulting to their injury. Howard v. United States, 184 U. S. 676, 692, 22 Sup. Ct. 543, 46 L. Ed. 754.

The case cited was an action by the United States, for the use of one David D. Stewart, against the sureties on the official bond of one Watson, formerly clerk of the United States Circuit Court for the Western District of Missouri. Stewart had brought a suit against Henry county, Mo., to recover the amount of three bonds issued by it. The county, when it answered, paid to Watson $2,525 as a tender to the plaintiff, and thought it was depositing the money in court; but Watson did not think so, and converted the same to his own use. The condition of Watson's bond was that he would faithfully discharge the duties of his office and seasonably record the decrees and determinations of the court of which he was clerk. Not-

withstanding Watson's bond was silent as to his accounting for money coming into his hands as clerk, and notwithstanding there was nothing in the bond or in the law that provided for any one bringing a suit on the bond other than the obligee, the United States Supreme Court allowed a recovery against the surety. Howard. We therefore think that upon principle and authority, where a referee has collected, from parties or estates in bankruptcy proceedings, moneys as compensation that under no theory of the law was he entitled to, and these fees have been collected or withheld from parties who are numerous and the individual amounts small, the United States has the legal and moral right to bring one suit in behalf of all parties injured, to recover back compensation illegally exacted by him. Any other view would render a referee's bond largely valueless in respect to such matters.

[2] The names of the individuals for whom the United States sues are not given in the complaint, but this is not always necessary. It is a matter upon which no issue can be made. American Bonding Co. v. Allison, 182 Fed. 810, 105 C. C. A. 242; Schott v. Youree, 142 Ill. 233, 31 N. E. 591; Clarkson's v. Doddridge, 14 Grat. (Va.) 42; Boston El. Ry. v. Grace & Hyde Co. et al., 112 Fed. 279, 50 C. C. A. 239; United States v. Abeel, 174 Fed. 12, 98 C. C. A. 50.

[3, 4] Counsel seem to treat the items sued for as belonging all to one class, and the trial court so treated them; but manifestly they cannot be so treated. Coming to the merits, we think it must be conceded that where a duty is imposed upon a referee by the bankruptcy law, and compensation is also fixed by that law for the performance of that duty, no power or authority exists in the United States District Court sitting as a court of bankruptcy to allow him any other or further compensation for the performance of the duty than that fixed by the bankruptcy law, and it must be further conceded that where the duty to be performed is a duty clearly imposed by the bankruptcy law upon the referee as such, and no specific compensation is fixed for the performance of said duty, the compensation fixed by the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585–9656]) as a whole is the only compensation which the referee can receive or that the court has power to allow. Section 72 of the Bankruptcy Act as amended (section 9656) reads:

"Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act."

General Order 35 (89 Fed. xiii, 32 C. C. A. xiii) provides:

"The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders." In re Halbert, 134 Fed. 236, 67 C. C. A. 18; In re Langford (D. C.) 225 Fed. 311, 314, 315; Dressel et al. v. North State Lumber Co. (D. C.) 119 Fed. 531.

The administration of the bankruptcy law existing prior to the enactment of the present one had been attended by grave abuses and scandals, resulting from the absorption of bankrupt estates in fees and costs of the officers connected with its administration. Congress therefore by the above legislation intended to cure the evil so

far as possible, and the courts should construe the law with reference to the object that Congress had in mind.

[5] The language of the complaint, in referring to the items which it is sought to recover, speaks of them as having been allowed to the referees. The trial court assumed, and it may have been justified in so doing, that it had the right to consider the excess fees, costs, and compensation as having been allowed by the United States District Court. The case being thus viewed, it sustained the demurrer by invoking the general principle that, where a court has once acquired jurisdiction, it has the right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed. The general principle as stated is correct, but, like all general principles, is subject to many qualifications in its application. The District Courts have a general jurisdiction in bankruptcy, but they have no power, when exercising that jurisdiction, to allow a referee, under any form or guise, any other or further compensation for his services as referee than that expressly authorized and prescribed by the bankruptcy law. It cannot transcend the power conferred by law. If a court has jurisdiction of an action on a money demand, it cannot in that action imprison the defendant. If it has jurisdiction of an action for libel, specific performance of a contract cannot be decreed in that action. If it has jurisdiction of an action for the possession of real property, the court cannot in that action probate a will. Such judgment, if rendered, would not be merely erroneous, but absolutely void. Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914; United States v. Walker, 109 U. S. 258, 3 Sup. Ct. 277, 27 L. Ed. 927; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

The principle invoked is better stated by Justice Swayne in Cornett v. Williams, 20 Wall. 250, 22 L. Ed. 254, as follows:

"That jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud."

In United States v. Walker, supra, Justice Woods said:

"Although a court may have jurisdiction over the parties and the subject-matter, yet, if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void."

When a court has power to fine only, and it also imprisons, the imprisonment is void. Ex parte Lange, supra.

[6] We are therefore of the opinion that the allowance of compensation by the District Court, other or different, or in addition to, that provided by the bankruptcy law for services clearly imposed upon a referee by said law, is beyond its jurisdiction and void, and its judgments may be attacked collaterally. The statute prohibits the court from exercising any judgment in the matter. There are many items sued for in these actions where this rule does not apply. Section 62 of the Bankruptcy Act (Comp. St. § 9646) provides:

"The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved

by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."

And General Order 26 (89 Fed. xi, 32 C. C. A. xi) provides:

"Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month."

We are of the opinion that, within the limitations of these provisions, the allowance of necessary expenses in bankruptcy proceedings is within the power and control of the United States District Court, both as to the occasion therefor and the amount thereof, and if parties are aggrieved by the action of the court in this behalf, they must, by petition for review or appeal, bring the matter directly before an appellate tribunal, and that, if this is not done, the judgment becomes final and is not subject to collateral attack.

[7] We are also of the opinion that General Order No. 12 (89 Fed., vii, 32 C. C. A. vii) does not limit the United States District Court in appointing special masters to the case of an application for a discharge, the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state. We think the United States District Court sitting in bankruptcy cases may, in the exercise of a sound discretion, refer issues to special masters and name a referee as such special master; that the fees and expenses of such special masters are matters within the control of the United States District Court (Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607; In re Lacov, 134 Fed. 237, 67 C. C. A. 19; In re Tracy, 179 Fed. 366, 102 C. C. A. 644; In re King, 179 Fed. 694, 103 C. C. A. 240; In re Langford [D. C.] 225 Fed. 311; In re Harrison Bros. [D. C.] 197 Fed. 321; Collier on Bankruptcy [11th Ed.] 1184); that its judgments with reference to these matters, unless presented to an appellate tribunal by petition to revise or appeal, become final and are not subject to collateral attack.

[8] We are also of the opinion that the United States District Court may authorize the referee to employ a clerk, and allow an expense for stationery, office rent, light, heat, and phone, and that these authorizations may be made by standing rule or order as well as by special order in any particular case. In re McCubbin Co., 33 Am. Bankr. Rep. 280; In re Pierce (D. C.) 111 Fed. 516; In re McNeil Corporation (D. C.) 249 Fed. 765.

[9, 11] In view of the arguments made by counsel for defendants, and by reason of language used in the opinion of the court below, it is well to state that these suits are not brought to recover damages from referees for their judicial acts, and therefore a discussion as to the responsibility of judicial officers for their acts is not relevant. It would seem to be argued by counsel that the taking of a fee conceded to be unlawful by a referee is a judicial act, and that he cannot be made to account therefor. Can it be said that if there is $500 disbursed to creditors by a trustee, and the referee takes 2 per cent. thereof as a commission, when the law allows only 1 per cent., that this is a judi-

cial act? A judicial act is an act of a court or magistrate in deciding a question of right litigated before him or referred by law to his judgment.

In the case above supposed, there would be no litigation, and the law referred nothing to the judgment of the referee. The proceeding was simply one to find 2 per cent. of $500, a mere mathematical calculation, ministerial in its quality beyond question; moreover, there could be no judicial act by a judge acting in his own case. It is again claimed that the United States cannot recover in this action, because the beneficiaries could not recover. The reason alleged for this position is that the beneficiaries would be bound by the judgment from which they did not appeal. We have already indicated when this rule would apply and when it would not.

[10] In behalf of the sureties it is urged that the condition of the bond would not cover moneys collected in the form of illegal fees; that to take illegal fees may be entirely consistent with a faithful performance of the duties of the office of referee. We do not think so. There is a duty imposed by law on referees to receive none but legal fees. If they do otherwise, they are not faithfully performing their duty. In the case of Howard v. United States, supra, the clerk was held for the misappropriation of funds paid to him as clerk, and the condition of his bond, so far as the present case is concerned, was the same as the condition of the bonds now in suit.

The judgment below in each of the above cases is reversed, and the causes remanded, with instructions to overrule the demurrers and allow the defendants to answer, if they are so advised, and to otherwise proceed in said cases in conformity to the views herein stated.

(257 Fed. 378)

BRYANT et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3250.

1. INDICTMENT AND INFORMATION ⚷87(7)—TIME OF OFFENSE—CERTAINTY.
   Indictment for seditious conspiracy, alleging commission of offense "on or about April 5, 1917," is sufficiently definite in respect of time.
2. CRIMINAL LAW ⚷1186(4)—APPEAL—HARMLESS ERROR—INDEFINITENESS OF INDICTMENT.
   Any imperfection in indictment as to definiteness of averment of time of commission of offense is cured by Rev. St. § 1025 (Comp. St. § 1691).
3. INDICTMENT AND INFORMATION ⚷125(5½)—DUPLICITY—CONSPIRACY.
   Indictment charging conspiracy to overthrow and destroy government and to levy war against it is not duplicitous; conspiracy being the gist of the offense, and but one being charged.
4. CRIMINAL LAW ⚷369(2)—EVIDENCE—SHOWING OTHER CRIME.
   Facts material to show the offense in issue are not incompetent, because tending to prove an independent crime.
5. CRIMINAL LAW ⚷824(8)—LIMITING EFFECT OF EVIDENCE—NECESSITY OF REQUEST.
   To put the court in error in not limiting effect of evidence admissible against one of the defendants, request by the others that this be done is necessary.

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

6. CRIMINAL LAW ⟹1169(7)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
Admission of declaration of one of defendants tried for conspiracy could not have injured the others, the jury being charged to consider declarations of a defendant only against himself or codefendants who were present and heard them, unless a conspiracy between him and the others was found; and he being acquitted necessarily involving a finding that he did not conspire with the others.

7. CRIMINAL LAW ⟹393(1)—PRIVILEGE OF ACCUSED—SECONDARY EVIDENCE.
The constitutional guaranty against compelling defendants to be witnesses against themselves does not go to the extent of preventing the government from proving by secondary evidence the contents of a document it cannot produce, because in a defendant's possession.

8. CRIMINAL LAW ⟹402(2)—SECONDARY EVIDENCE—LETTERS IN DEFENDANT'S POSSESSION—DEMAND.
Tracing letters into defendant's possession authorizes the government to introduce secondary evidence of their contents, without a demand for their production, especially where defendants testify to their destruction.

9. WITNESSES ⟹360—IMPEACHMENT—REBUTTAL.
In rebuttal of evidence of conviction of government witness, shown by defendants for purpose of impeachment, his pardon is competent.

10. CRIMINAL LAW ⟹1169(6)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
No harm was done by admission of government evidence; all the defendants affected thereby having been acquitted.

11. CRIMINAL LAW ⟹877—INCONSISTENT ACQUITTALS AND CONVICTIONS.
It is no ground for setting aside a conviction of certain defendants of conspiracy that the evidence may be equally strong against others who were acquitted.

12. CONSPIRACY ⟹43(12)—VARIANCE—NUMBER OF CONSPIRATORS.
It is only necessary to show conspiracy between two or more of all those charged with conspiracy to warrant conviction of those shown to have conspired.

13. CONSPIRACY ⟹28—ILLEGALITY—INCEPTION BEFORE STATUTE.
A conspiracy against enforcement of the Draft Law, entered into before its passage, continuing up to and after the time it became effective, then became illegal, even if it was not before.

14. CONSPIRACY ⟹28—TO OVERTHROW GOVERNMENT.
Though the specific object of the conspirators was to prevent enforcement of the Draft Law, if to attain that object an attempt was to be made, if necessary, to supplant the administration with a provisional government, the conspiracy was to destroy or overthrow the government, in violation of Penal Code, § 6 (Comp. St. § 10170).

15. CONSPIRACY ⟹28—TO LEVY WAR.
It is a conspiracy to commit treason by levying war against the United States, to conspire to prevent altogether the enforcement of a statute thereof.

16. CONSPIRACY ⟹27—AGAINST GOVERNMENT—OVERT ACT.
An overt act is not necessary for conviction, under Penal Code, § 6 (Comp. St. § 10170), of conspiracy to destroy or overthrow the government, or to wage war against the United States.

17. CONSPIRACY ⟹47—TO RESIST LAW—GENERALITY—EVIDENCE.
Relative to necessity of resistance of a law being general, that a conspiracy to resist it shall constitute one to destroy or overthrow the government, or to wage war against the United States, evidence *held* sufficient to show conspiracy of defendants to prevent enforcement of conscription under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k) all over the United States, not alone in their individual cases.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

18. CONSPIRACY ⟹48—AGAINST GOVERNMENT—QUESTION FOR JURY.
Evidence *held* sufficient to make it a jury question whether defendants conspired to overthrow and destroy the government and to levy war against the United States.

19. CONSPIRACY ⟹43(12)—VARIANCE—OBJECTS OF CONSPIRACY.
Though indictment under Penal Code, § 6 (Comp. St. § 10170), charges conspiracy to overthrow and destroy the government and to wage war against the United States, it is enough to establish either.

20. CRIMINAL LAW ⟹377—EVIDENCE—DEFENDANT'S GOOD CHARACTER—LIMIT OF TIME.
Proof of good character of defendants as to being law-abiding citizens may be limited to the date of the alleged commission of the offense.

21. COURTS ⟹337—FEDERAL COURTS—FOLLOWING STATE PRACTICE—IN CRIMINAL MATTERS.
Federal courts do not follow practice of the courts of the states in which they sit, in criminal matters, and need not permit argument to follow charge in conformity to state practice.

In Error to the District Court of the United States for the Northern District of Texas; George W. Jack, Judge.

G. T. Bryant, Z. L. Risley, and S. J. Powell were convicted of violation of Penal Code, § 6, and they bring error. Affirmed.

See, also, 245 Fed. 682.

William H. Atwell, of Dallas, Tex. (C. Nugent, of Hamlin, Tex., on the brief), for plaintiffs in error.

W. M. Odell, U. S. Atty., of Ft. Worth, Tex. (William E. Allen, Asst. U. S. Atty., of Dallas, Tex., on the brief), for the United States.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The plaintiffs in error were indicted, tried, and convicted in the District Court of the United States for the Northern District of Texas for an alleged conspiracy to overthrow, put down, and destroy by force the government of the United States and to levy war against them. The indictment included originally 55 defendants and 8 counts. A verdict of guilty was returned against the 3 plaintiffs in error only of all those originally indicted, and fixed their guilt under the first count of the indictment alone. This count charged the plaintiffs in error with a violation of section 6 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. § 10170]), by conspiring to overthrow, put down, and destroy by force the government of the United States and to levy war against them. That section provides, among other things, that if two or more persons in any state or territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, they shall each be fined not more than $5,000, or imprisoned not more than 6 years, or both. No overt act is required to complete the offense created by this section.

The plaintiffs in error were officials of a secret organization called the Farmers' and Laborers' Protective Association, which was or-

ganized in Texas in the year 1914 or 1915, and it was in connection with their activities as officials of this organization that the charges were preferred. The contention of the government is that the plaintiffs in error, together with the defendants jointly indicted, who were acquitted, and others not indicted, formed a conspiracy to prevent the enforcement of any conscription law that might be passed by Congress, and to overthrow the government of the United States, in the event such a law was enacted and sought by the government to be enforced.

The government contends that, to accomplish the result of the conspiracy, the conspirators created or used the machinery of the organization named and its membership, and that, whatever might be said of the guilt of the members of the association other than the three plaintiffs in error, the evidence, as to them, satisfied the jury, and was sufficient for that purpose, that they did conspire to overthrow the government and levy war against it, if conscription was attempted by it to be enforced; that the plaintiffs in error introduced and urged in the conventions of the association the adoption of resolutions looking to that end; urged the procuring by the members of high-power rifles, in anticipation of forcible resistance to conscription, if it became necessary, and the sending of delegates to the adjoining state of Oklahoma to secure the co-operation of such organizations as the Working Class Union and the Industrial Workers of the World in this intended purpose; that they urged upon the local lodges of their own organization and their members resistance to conscription by force and arms, and the procuring of arms to that end; and that, in obedience to such urging, members of the organization did actually procure rifles, and some few, after so arming themselves, took a position in a canyon, prepared there to offer resistance to the officers of the government, if any attempt to conscript them was made.

The government contends that, but for the timely interruption of the conspiracy by the apprehension of its leaders, actual resistance would have come about. The greater part of the evidence relied upon by the government to establish the conspiracy related to facts which occurred before the passage of the Selective Draft Act.

The defendants, in the District Court, admitting the organization of the Farmers' & Laborers' Protective Association and their membership therein, denied that it or its members entertained any treasonable designs against the United States government, and asserted that its object was to benefit the working and farming classes by the use of co-operative stores and other lawful methods. The trial consumed many weeks, and the evidence is so voluminous as to make a narrative of it, in even a condensed form, impracticable in an opinion. It suffices to say that, at least as to the plaintiffs in error and some of the other defendants, there was substantial evidence that they designed something more than an innocent association of workingmen and farmers to profit by co-operation in lawful ways, and that they combined with the purpose to produce among the members an uprising against any enforcement of any conscription or draft law

that might be enacted, and to prevent such enforcement, by violence, if necessary.

[1-3] The plaintiffs in error question the sufficiency of the indictment, under which they were convicted, upon two grounds. The first count of the indictment, on which alone a conviction was had, is only to be considered. It is contended that the averment of the date of the commission of the offense is not alleged with sufficient certainty in this count. The averment is that it was committed "on or about the 5th day of April 1917." The indictment was sufficiently definite in respect of time, and any imperfection in this respect is cured by section 1025, Revised Statutes (Comp. St. § 1691). United States v. McKinley (C. C.) 127 Fed. 168; United States v. Lair, 195 Fed. 47, 115 C. C. A. 49; United States v. Aviles (D. C.) 222 Fed. 474.

The plaintiffs in error further criticize the first count of the indictment upon the ground that it is duplicitous, in charging separate offenses in the same count. The count charges but one conspiracy, though its purposes were more than one. Conceding that to overthrow and destroy the government is a separate offense from levying war against it, it does not follow that a conspiracy to do both constitutes more than one offense. The conspiracy is the gist of the offense, and but one is charged. The offense itself is therefore single. John Gund Brewing Co. v. United States, 206 Fed. 386, 124 C. C. A. 268, and cases cited; United States v. Aczel (D. C.) 219 Fed. 917.

[4] The plaintiffs in error complain of the admission, over their objection, of evidence tending to show facts which would constitute crimes against the state, or the United Sates, different from the accusation for which they were being tried. It is true that the law does not permit one crime to be proved in order to raise the probability that another has been committed. If, however, the facts which tend to show the independent crime are also material to show the offense being tried, they do not become incompetent because they tend to prove the commission of an independent crime. The evidence objected to was pertinent to establish the existence of the conspiracy relied upon by the government, and was properly admitted. The court instructed the jury as to the only legitimate effect of the evidence. Jones v. United States, 179 Fed. 584, 103 C. C. A. 142.

[5, 6] The plaintiffs in error complain of the admission in evidence of an alleged statement testified to by the government witness Williams to have been made by their codefendant, Bergfeldt, who was acquitted, that he had papers in his possession that might put him in the penitentiary if it were known. The admissibility of this statement, as against the defendant who made it, is clear. If admissible as to Bergfeldt, the other defendants should have requested that its effect be limited to Bergfeldt, in order to put the court in error for not so limiting it. However, Bergfeldt was acquitted, and, in order to reach that result, the jury must have found that he did not conspire with any of the plaintiffs in error, for the indictment charged no other offense against him. The court did charge the jury that they should consider declarations of defendants only against themselves, or those of their codefendants who were shown to have been present and to

have heard them, unless they first found a conspiracy to have existed between the defendant making the declaration and those against whom it was asked to be considered. The jury, therefore, as they were instructed, must have considered the statement objected to against Bergfeldt only, since they found the plaintiffs in error had not conspired with him, by their verdict of acquittal. Its admission, therefore, worked no injury to the plaintiffs in error.

[7, 8] The plaintiffs in error complain that they were compelled to be witnesses against themselves, in violation of their constitutional right. The contention is based upon the action of the District Judge in permitting the government to trace certain letters and documents to the possession of certain of the defendants on trial, and then permitting secondary and oral evidence of their contents to be introduced. The constitutional guaranty does not go to the extent of preventing the government from proving by secondary evidence the contents of a document it cannot produce because it is in the possession of a defendant. That fact authorizes the introduction of secondary evidence, and, to lay a predicate for its introduction, the government must necessarily establish to the court's satisfaction the possession of the defendant. No demand for the production of any document was made upon any defendant in the presence of the jury. McKnight v. United States, 122 Fed. 926, 61 C. C. A. 112; Heinze v. United States, 181 Fed. 322, 104 C. C. A. 510; Trent v. United States, 228 Fed. 648, 143 C. C. A. 170; Watlington v. United States, 233 Fed. 247, 147 C. C. A. 253. The record also shows that the defendants concerned, testifying in their own behalf, proved the destruction of all the documents, except a letter, which their attorney stated was in his files, and which he stated he would produce, but was unable thereafter to locate. The District Judge also instructed the jury to disregard the evidence tracing the documents to the possession of defendants. The plaintiffs in error's rights were fully protected.

[9, 10] The plaintiffs in error also complain of the admission of the evidence of a pardon granted to the government witness Garner by the Governor of Texas. The defendants sought to impeach the evidence of Garner by showing his conviction and sentence to the state penitentiary on a charge of robbery. In explanation the witness Garner testified, without objection, to the facts attending the securing of his pardon. The objection was made to the pardon itself. We think it was competent in rebuttal of the evidence of conviction. As the defendants who were alone affected by Garner's evidence were all acquitted, no harm was done by its admission, in any event.

The plaintiffs in error demurred to the government's evidence, and also requested an instruction directing their acquittal, upon the close of all the evidence. The evidence is too extensive to abstract or analyze. There was evidence sufficient to justify the jury in determining that the plaintiffs in error, together with other of the defendants, not convicted, but apparently no less guilty, were active in their opposition to the conscription of citizens of the United States to take part in foreign wars. This opposition began in the organization of which plaintiffs in error were officers prior to the date of what is

called the first Cisco convention in February, 1917. At that convention a resolution, called the Haskell county resolution, was passed. In its original shape it contained these words:

"And we oppose the United States government in the prosecution of a foreign war."

Upon the suggestion that this might be treasonable, it was amended, after adoption, by substituting for the words "United States government" the words "capitalistic classes." This resolution had been previously adopted in its original form by local and county lodges in Haskell county. In May, 1917, a second state convention of the order was called and assembled at Cisco. One of the purposes for which this convention was called was to discuss the question of conscription. At this convention a committee on resolutions was selected by the plaintiff in error Risley, who was president of the order. It was open to inference that a majority of this committee were known to Risley to be men of radical views. The evidence tended to show that Risley suggested to the committee that the radical report be made the majority report, and it was so presented to the convention. It is true that Risley testifies his purpose in making the suggestion was to procure the defeat of the majority report on the floor of the convention. His good faith in this respect was for the jury, and it probably decided that question adversely to him. The minority report was the one adopted by the convention. It is a matter of fair inference, however, that the conservative action of the convention was distasteful to the leaders of the order, and that they did not acquiesce in it, but immediately took steps to continue the agitation for radical and violent measures against conscription. The first was the selection of the radical majority of the resolutions committee as delegates to go to Oklahoma to seek the co-operation of the radical organizations there operating.

The failure of the radical majority resolution of adoption by the convention would indicate that the order was not willing to adopt violent measures, and if the conspiracy charged had been coextensive with the membership of the order, or a majority thereof, it might have been fatal to the government's contention. The conspiracy charged was not necessarily so broad. It might include any part of the membership, though less than a controlling majority. The jury acquitted all but the three plaintiffs in error, and, by so doing, found against the conspiracy, so far as its scope included the order as an organization, only implicating its officers. The fair inference to be drawn from the verdict is that the jury believed that the plaintiffs in error had formed an inner conspiracy, the purpose of which was to use the machinery of the order to resist any draft law that might be enacted, even to the extent of overthrowing the government, if necessary, and to accomplish this by overcoming the conservatism of the majority and committing them to their own views. A tendency of the evidence, if believed, would authorize a finding that certain of the members of the organization, including plaintiffs in error, were not dissuaded from such action by the adverse vote on the majority resolution, but agreed

to continue agitation to accomplish, through the organization, violent opposition to the government, in the event it should attempt to enforce conscription. The evidence tends to show that these members considered that such action was to be deferred only until co-operation with other kindred orders could be obtained, and their power so strengthened. The report of the delegates, on their return from Oklahoma, of the impracticability of such co-operation, was not accepted as final, since, after their return and report, the letter to the local lodges signed by the plaintiff in error Powell clearly indicates the continuance of the opposition to conscription, even up to the day of the enactment of the Selective Draft Law.

The evidence also tends to show that, after the adjournment of the Cisco convention in May, forcible opposition to conscription continued to be advocated in the locals; that high-power guns were procured by members in response to urging by leaders, to be used in resisting conscription; and that certain members, armed to resist, left their homes and took position in a canyon, to resist the conscription officers. The record tends to show that the conspiracy continued to progress until it was interrupted by the indictment and arrest of certain of the defendants, on and after May 18, 1917, the date of the enactment of the selective draft act (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2044a–2044k]). There is evidence, aside from the official connection of the three plaintiffs in error, tending to connect them with such an inner conspiracy. Powell's letter to the locals, dated May 16 or 18, attached to which was a petition in opposition to conscription, to be signed by the members, is some evidence of his connection, and that it continued up to the date of the enactment of the law. Risley's conduct, as presiding officer, at the second Cisco convention, was, of itself, evidence tending to show his connection, if the jury believed from it that he then advocated the adoption of the majority resolution, and it was open to them to so find. Bryant's utterances in the locals in the course of his position as organizer was evidence of his connection, the sufficiency of which was for the jury to determine. The record contains other evidence to the same effect.

[11, 12] The fact, if it be a fact, that codefendants of the plaintiffs in error, against whom the evidence was equally persuasive, were acquitted by the jury, is no reason for setting aside the judgment of conviction against plaintiffs in error. It was necessary for the government to go no further than to establish a conspiracy as against any two or more of the defendants on trial. The organization was not on trial, but certain of its members, and a conspiracy of the kind charged, proven between any two of its members, as individuals, answered the requisition of the indictment.

The plaintiffs in error contend that a conspiracy to resist the enforcement of anticipated conscription was not forbidden by law: (1) Because the law was not in effect when the conspiracy was formed; (2) because it was not shown by the evidence to be a conspiracy to levy war against or overthrow the government of the United States, as charged in the first count of the indictment; and (3) because the

evidence showed merely individual resistance, and not a general plan to prevent the enforcement of the draft law.

[13] 1. We are not prepared to say that a conspiracy to prevent the general enforcement of a law, formed in advance of its enactment, cannot become illegal unless and until it is enacted. The threat implied in the conspiracy may operate to prevent the enactment of the law, and so interfere with an operation of the government as much as would an attempt to prevent its enforcement when enacted. The purposes of this case do not require a decision of that question. The Selective Draft Law was enacted. A conspiracy aimed at its enforcement, though entered into before its passage, would become illegal, upon its passage, if it was not before so. Otherwise the government would have no redress against preparation by force and arms to resist the enforcement of a proposed law until after its passage, when it might well be too late. Unless such a conspiracy is shown to have been abandoned before the law against which it is aimed takes effect, it would be none the less punishable because entered into in advance of the passage of the law. In this case the jury might well have inferred from the evidence that the conspiracy, though formed before May 18, 1917, the date of the enactment of the Selective Service Law, continued up to and after that date, and was only interrupted then by the interposition of the government and the arrest and indictment of the alleged conspirators.

[14-16] 2. The plaintiffs in error contend that, if a conspiracy is proven by the evidence in the record, it is not a conspiracy to levy war, or to destroy or overthrow the government, and so not the conspiracy charged in the first count of the indictment, on which alone conviction was had. The motive of the conspirators does not necessarily determine the character of the conspiracy. Their object may have been to prevent the enforcement of a specific law. If, to attain that object, they conspire to overthrow or destroy the government, as a means to that end. the conspiracy is one to destroy or overthrow the government. There is evidence in the record tending to show that, to defeat conscription, if necessary, an attempt was to be made to supplant the administration by a provisional government. If the jury so found, a conspiracy to destroy or overthrow the government would be proven. The evidence also tended to show that there was a conspiracy to prevent the enforcement of conscription and the act of Congress providing for the selective draft. A conspiracy to prevent altogether the enforcement of a statute of the United States has been held to be a conspiracy to commit treason by levying war against the United States. In the case of United States v. Fries, Fed. Cas. No. 5,127, Circuit Judge Chase, speaking for the Circuit Court, said, in charging the jury:

"The court are of opinion that, if a body of people conspire and meditate an insurrection, to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor, but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war; and the quantum of the force employed neither lessens nor increases the crime—whether by 100 or by 1,000 persons is wholly immaterial."

This extract was quoted with apparent approval by Chief Justice Marshall in the opinion of the Supreme Court in the case of Ex parte Bollman, 4 Cranch, 75, 127, 2 L. Ed. 554. In the case of United States v. Mitchell, 2 Dall. 348, 355, 1 L. Ed. 410, Justice Paterson, in charging the jury, said:

"The first question to be considered is: What was the general object of the insurrection? If its object was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offense, in legal estimation, is high treason; it is an usurpation of the authority of government; it is high treason, by levying of war."

In charging the grand jury in the Fries Case, Circuit Judge Iredell defined treason by levying war as follows:

"But I think I am warranted in saying, that if, in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the Congress of the United States altogether (as, for instance, the land tax act, the object of their opposition), any forcible opposition calculated to carry that intention into effect was a levying of war against the United States, and of course an act of treason."

The opinions of Judges Paterson and Iredell are referred to approvingly by Chief Justice Marshall in the case of Ex parte Bollman. It is true that, in order to constitute treason, as distinguished from a treasonable conspiracy, an actual assemblage of men in force is necessary, as was held in Ex parte Bollman, supra, and in United States v. Burr, 25 Fed. Cas. 162. The plaintiffs in error were, however, indicted and convicted for a conspiracy under a statute not even requiring proof of an overt act in order to convict.

[17-19] 3. It is also true that the cases cited hold that the resistance or the conspiracy to resist the enforcement of the law must be general, and not limited to a particular instance, or against a particular officer, or from a private or personal motive. There is evidence, however, in the record, which, if believed by the jury, was sufficient to show a conspiracy on the part of the plaintiffs in error to prevent the enforcement of conscription under the Selective Service Act all over the United States, not alone in their individual cases.

We think the record contains evidence, the sufficiency of which was for the jury to determine, that the plaintiffs in error conspired to overthrow and destroy the government of the United States and to levy war against it, as charged in the first count of the indictment. The government was not required to establish both, though both were averred. It established the conspiracy, as alleged, by proof of either.

[20] The plaintiffs in error complain because evidence as to the good character of some of them was limited to the finding of the indictment. Proof of good character as to being law-abiding citizens might properly have been limited to the date of the commission of the offense. 16 Corpus Juris, 581. No restriction, as to date, was placed upon evidence of reputation for truth and veracity of those defendants who testified in their own behalf.

The District Judge fully and fairly charged as to the effect of evidence of good character, and was justified in refusing the requested instructions on this subject-matter for that reason.

[21] The federal courts do not follow the practice of the state courts of the states in which they sit, in criminal matters, and there was no obligation to permit argument to follow the court's charge in conformity with the Texas practice.

The special instructions requested by the defendants have been examined. They were either covered by the court's general charge, or properly refused, because not asserting correct propositions of law, or were not applicable to the facts of the case. The questions presented by the motion in arrest of judgment have been heretofore considered.

We conclude that there is no reversible error in the record, and the judgment of the District Court is affirmed.

(257 Fed. 388)

AUGUST v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1918.)

No. 5216.

1. CRIMINAL LAW ⟹450—OPINION EVIDENCE—MATTER IN ISSUE.

On trial of an indictment charging an offer to bribe members of a draft board to exempt a person from service, the understanding of such members as to whether the words used by defendant constituted an offer *held* properly excluded as incompetent; this being the very matter in issue.

2. CRIMINAL LAW ⟹1055—APPEAL—DISREGARD OF TECHNICAL DEFECTS—EXCEPTIONS TO ARGUMENT.

Under Judicial Code, § 269, as amended by Act Feb. 26, 1919, that "on the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties," it is the duty of the Circuit Court of Appeals to consider prejudicial remarks of counsel, although no exception was taken.

3. CRIMINAL LAW ⟹723(1)—IMPROPER ARGUMENT OF COUNSEL.

Argument of counsel for the government in a prosecution for offering to bribe member of draft board, referring to the war with Germany, etc., *held* to contain such an appeal to prejudices of the jurors as was likely to prevent a fair consideration of the issues.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Criminal prosecution by the United States against Albert J. August. Judgment of conviction, and defendant brings error. Reversed.

John G. Parkinson, of St. Joseph, Mo. (Benjamin Phillip and James W. Mytton, both of St. Joseph, Mo., on the brief), for plaintiff in error.

E. B. Silvers, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

CARLAND, Circuit Judge. The plaintiff in error, hereinafter called defendant, was jointly indicted with one Kalis for violating section 39 of the federal Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10203]). The indictment was in two counts. The first count charged, among other things, that the defendant did unlawfully, willfully, knowingly, corruptly, and feloniously offer the sum and amount of $500, the exact description of which was unknown to the grand jury, to one Walter P. Fulkerson, a member and chairman of the local board known and designated as the "Local Board for Division No. 3, City of St. Joseph, State of Missouri," with the corrupt intent and purpose to influence the decision and action of Fulkerson as chairman and member of said board in relation to the making of a physical examination of said Kalis and in passing upon and determining his physical qualifications for the military service of the United States. The second count was in the same language, except the person to whom the $500 was alleged to have been offered was one Walter L. Mack, a member and clerk of the above board. A trial on this indictment resulted in the acquittal of Kalis and the conviction of the defendant. From a judgment imposing a fine and imprisonment in the penitentiary, the case is here for review.

[1] To sustain the case of the prosecution, two separate conversations had by the defendant with Fulkerson and Mack were given in evidence. The conversation with the former, as testified to by him, was as follows:

"Well, Mr. August came up about—I think about 6 o'clock in the evening, and I had just gotten home from the Exemption Board, and he drove up and got out of his car and came up the steps. I turned around. I saw him getting out of his car, and I turned around to meet him; so I walked down the steps and he came up the steps. I live on a terrace probably 10 or 12 steps high; and we met and probably shook hands. I don't remember whether we did that or not; but Mr. August just said—he says, 'W. P.,' he says, 'How can we get this boy off?' And I had in mind his son. I said, 'What boy do you refer to? or 'What boy are you talking about?' something like that, and he said, 'Why, Ike Kalis.' He says, 'You know Ike.' And about that time Ike hollered at me. Ike was either in the car, or getting out of the car, just down below. Ike hollered at me, and then I recognized him, and A. J. told me it was Joe's brother, and I said, 'Well, I remember him now.' And I told him I didn't know of any way to get Ike off. I said I didn't know of any way to get Ike off, if he is eligible to go; and he said, 'Well, he saw'—he says, 'I just can't afford to have this boy go, it'll ruin his business.' I thing he mentioned, 'It will kill his old father—going to ruin his business,' and he says, 'I can't—just can't afford to have this boy go; I must get this boy off some way'—something like that."

Counsel for the United States then asked the following questions and the witness replied as here stated:

"Q. Yes; well, for the purpose of refreshing your recollection, I will get you to state on that occasion if Mr. August didn't say to you, 'I would rather give $500 out of my own pocket right this minute than to lose this boy.' A. Well, substantially that.

"Q. Yes; you know whether or not he did say that, Mr. Fulkerson—'I would rather give $500 out of my pocket right this minute than to lose that boy?' A. I think he said, 'I would rather lose $500,' or 'I would rather give $500, than to see this boy go. I would rather go myself' Of course, it has been a good while ago for me to say he said, 'Right this minute;' I don't know that he said that. The idea was that he didn't want this boy to go.

"Q. Your recollection would be probably better in September, when the grand jury met, than after the passage of this much time? A. Yes.

"Q. Now, Mr. Fulkerson, I desire to put this question before you again—if he didn't say to you in that conversation, 'I would rather give $500 out of my pocket right this minute than to lose that boy'—if he didn't say that to you as near as you can recollect? A. Well, he said something like that; yes. He said he would rather go himself. Well, I made fun of him, and he said, Well, I would rather go myself—I would rather than $500 not to see this boy have to go.' 'I would rather than anything,' he says, 'I can't afford to have this boy go;' and I just turned it off in a joke with him, and I said, 'Why, A. J., you know you're getting too old to go, and no use talking that way,' and we discussed it in this way."

On cross-examination the witness testified:

"Oh, he just said, 'I can't have this boy go.' He says, 'I would rather go myself—I would rather give $500 out of my pocket than to see this boy go.' I said, as I have stated, 'It is out of the question about you going to war; you can't go to war.'"

Counsel for defendant then asked the following questions on cross-examination and they were ruled upon by the trial court as follows:

"Mr. Parkinson: You never heard Mr. August at any time say anything out at your home that indicated that he intended to corrupt you, or anything of that kind; you never heard him say anything that indicated that?

"Senator Wilson: We object to that, for that is the question to be determined by this jury. That is what this lawsuit is about; what he meant by it.

"The Court: Sustained.

"Mr. Parkinson: Well, we except to the ruling of the court.

"The Court: He may state what was said, but he can't give his opinion about it.

"Q. Well, Mr. Fulkerson, did you hear Mr. August say anything the night he was out at your home that would indicate to you that he wanted to give you $500 to do anything for or against—for or against this man's being taken into the army or being left out?

"Senator Wilson: We object to that.

"The Court: Objection sustained.

"Mr. Parkinson: We again except. We offer to prove by this witness that nothing was said there that indicated to him that Mr. August intended to brike him, or offered to bribe him, or offered him in any sense $500, or anything of that kind, in the sense of offering it to him, in the sense of its being offered to him to influence his action, or anything of that kind.

"The Court: The offer is rejected, upon the ground that the witness has stated what was said, and it is for the jury to determine what the purpose was, and the witness is not entitled to state his conception of it.

"Mr. Parkinson: Q. Mr. Fulkerson, did Mr. August offer you $500—where is that indictment—did Mr. August offer you $500, or any other sum at your home that night—offer to you—

"Senator Wilson: That is the same question asked over again.

"The Court: Well, the court will permit whatever is proper about that. If you mean the tender, the physical tender, of money, if you mean by that an interpretation of what those words meant, the court has ruled on that. If you mean to ask him whether he had $500 there which he offered him physically, of course, you may answer that. He has already answered that, and said he did not.

"Mr. Parkinson: Well, this man has been charged on a certain date with—Mr. August has been charged with offering him $500, and now I want to ask him whether in the language of the indictment this is the man—whether on that night, or at any other time, he offered him $500, or any other sum.

"The Court: If you want to put that on that ground, the ground of physical offer of money; that is, that the money was there which he offered—

"Mr. Parkinson (interrupting): No.
"The Court: If that is not what you mean, then the objection is sustained.
"Mr. Parkinson: We except."

The conversation had with Mack as related by him was as follows:

"So we took a drink of root beer, I believe, if I remember correctly, and turned around and came outside of the store, and Mr. August says, 'Mack, I want you to do something for me;' and I said, 'What is it, A. J.?' 'This man Ike Kalis comes up before your board for examination; I don't want him to go to war.' I said, 'Mr. August, if he passes the physical examination, he will have to go to war, so far as my—so far as I am concerned. I couldn't do any different if he was a brother of mine.' He said, 'I can't afford to lose that man; he's a mighty valuable man. I wouldn't have him go to war for $500 out of my own pocket.' I said, 'If he passes the examination, Mr. August, he will have to go the same as any other boy.' He says, 'How about your doctor?' I says, 'I don't believe you could touch him with a million. You would insult him if you would say anything to him.' He says, 'How about Dr. Weary?' And I repeated what I have said. He said, 'How about Dr. Ladd?' I said, 'If he passes the examination before Dr. Weary, he will never get to Dr. Ladd. If he fails to pass Dr. Weary, he will be re-examined in the afternoon before Dr. Ladd and Mr. Fulkerson.' "

Counsel for defendant on cross-examination made the following offer, which was denied, and counsel, out of deference to the ruling of the court when Fulkerson was on the stand, pursued the matter no further:

"I offer to prove by this witness that he did not understand by anything that Mr. August said that he intended to corruptly influence him to do anything improper to either admit or reject Mr. Kalis into the army."

These rulings of the trial court are assigned as error. There was no error in the above rulings of the court. How Fulkerson and Mack understood the language used by the defendant, or whether they understood it at all, was immaterial. What the language meant was a question for the jury, and the opinions of Fulkerson and Mack as to what it meant were inadmissible. Cases cited by counsel for defendant on this point are not applicable. The inadmissibility of the evidence ruled out is made to appear at once, if we suppose counsel for the United States endeavoring to prove his case in the same way from a willing witness. If this was attempted, counsel for defendant would vigorously protest, and he would be right in so doing. There was evidence to take the case to the jury. The indictment was good against a motion in arrest. Such motions are not favored. They only reach a pleading that is wholly bad. Baker v. Warner, 231 U. S. 588–592, 34 Sup. Ct. 175, 58 L. Ed. 384.

[2] We see no reversible error in the charge of the court. We are of the opinion, however, that the judgment below must be reversed for error committed by the Assistant United States Attorney in his argument to the jury. There were no exceptions taken at the trial to the remarks of counsel, and it has been the uniform ruling of this court that such exceptions are necessary in order for this court to review the error if any. Cudahy Packing Co. v. Skoumal, 60 C. C. A. 306–313, 125 Fed. 470, 477; Union Pacific R. Co. v. Field, 69 C. C. A. 536–538, 137 Fed. 14, 16; Chambers v. United States, 237 Fed. 520, 150 C. C. A. 395.

We think, whatever may be our power otherwise, or our inclination to exercise it, the late amendment to section 269, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163, as amended by Act Feb. 26, 1919, c. 48), fully authorizes and commands us to look to the entire record before the court, and render judgment without regard to the technical error of the want of exceptions to the remarks of counsel. The amendment reads as follows:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Public—No. 281—65th Congress.

[3] There were two issues submitted to the jury by the trial court: (1) Did the conversations in evidence constitute an offer of money to Fulkerson and Mack? (2) If they did, were such offers made with the intent to influence their decision in relation to the matter charged? The issues being as stated, the Assistant United States Attorney, in making the opening argument for the prosecution, spoke as follows:

"Of course, the gravity of this event is not to be measured, and the influence of what you do here to-day is not to be calculated. It will be unnecessary, probably would be unfitting, for me to remark at any length as to the momentousness of the events that are transpiring in the world to-day; but I feel it is impossible for me to refrain from some reference to those things, and the relevancy of those events to the trial that here is proceeding will justify my remarks along that line.

"You know different people view different things in different ways. That which deeply impresses one man may be considered by another with no great concern; but as for me, gentlemen, in thinking of the causes which precipitated the entrance of America into the great struggle which now embraces practically all mankind, I can consider the evil imaginations of the emissaries of the German government in this country while we were yet at peace and neutral, with some calmness; I can even think of the illegal establishment of a blockade, and the futile manner in which it was sought to be enforced, without any great heat. But when I come to think of the outrages that have been committed against helpless, defenseless, and unsuspecting peoples—when I think of the atrocities committed against the women and the helpless children of France, and of Belgium, and of Serbia, and of Armenia, and of Poland, when I think of the outrages committed against womanhood throughout Europe, without justification, without provocation, without cause, and without reason, save to gratify the ambition of a war lord, and to satisfy the lust of his followers, my blood boils, and I know, gentlemen, that our cause is a just cause, and a righteous cause, and the entrance of America into this war is a just entrance, and a righteous act, and when I think of those things I turn to Him whose omnipotence has always upheld the arm of the righteous and confounded the wicked, who has always lent succor to the helpless and consolation to those who are sad of heart, and I turn to Him with an unswerving faith that despite the numbers of the enemy, despite their preparation, despite schemes and their ingenuity, and despite even the villainous and traitorous conduct of some even among us who would thwart and impede the work of our Lord in this great struggle, in spite of all these things, I cannot help but feel that somehow in His omnipotence eventually He will see our boys come home crowned with the laurels of victory.

"I say, gentlemen, that the gravity of the things that we do here to-day is not to be measured, and, as I said a while ago, I have a feeling of sincerest pride to be engaged in this prosecution. On the other hand, I have some sense of chagrin; not that my task is obnoxious, or that my duty is onerous; not that. But, gentlemen, I was born and raised in the state of Missouri, and

it is not without some sense of shame that I stand here in this public court to prosecute one whom I am convinced while living within the borders of that lovely state, whose name and emblem I revere as second only to that of the nation, of which she forms a part, I say that I feel a sense of shame that there is within her borders one so low and so vile that he would employ his efforts, his influence, and his filthy gold to thwart and impede the efforts of his nation, which has blessed him so abundantly with security and with happiness and with prosperity and the things of this world.

"You know, I came from the southwestern part of this state, and we folks down there have always looked upon northwest Missouri as a great territory peopled by noble people. This is my first experience in this division of this court, and yesterday morning, when I looked at this panel as they came into court, and the first I looked over the faces of the spectators who had assembled here, I said to myself that my estimation of the character and quality of the people of northwest Missouri had never been too high, and I trust and believe that the outcome of this prosecution will not necessitate that I shall in any wise revise the high opinion that I have always entertained of northwest Missouri and her people.

"I said awhile ago that the gravity of this occasion is not to be measured, and it is not. It is not as though, gentlemen, we were prosecuting some one on a charge of having stolen a horse or a cow, for then only a few people would be directly interested. It is not, gentlemen, as though we were prosecuting some one on a charge of murder, for in that case only a comparatively small community would be directly interested. You know we are prone to think of the crime of an attempt to corrupt the courts as being very heinous and striking at the very foundations of our institutions. Gentlemen, this occasion and this prosecution is more grave than were it a prosecution against some one for having attempted to corrupt his honor on the bench, though in such a case only the immediate litigants involved would be directly interested or affected. *But to-day, gentlemen, the world is engaged in a war, the whole world is engaged in a war for humanity; a war which holds in its balance the very future of the race; a war for the rights, the sacred rights, of man, and the honor of womanhood, and the security and sanctity of little children; and we are here engaged in the prosecution of one who, as I am convinced, was willing to place his influence and his efforts and his filthy gold in the scales against those things which all men hold most dear.*

"This prosecution, gentlemen, will not affect only St. Joseph. It will not only affect Buchanan county. It will not only affect northwest Missouri, and reflect either dishonor or credit upon her; but the result of you gentlemen's deliberations will be heralded to every nook and every corner of this land; yea, and in some way I doubt not it shall waft its way to the agents of hell opposed to us across the mighty waters, and there, gentlemen, the verdict of this jury will be read and heard by the war lords of Germany as a beat from the pulse of the American people. So I say that the gravity of this occasion cannot be measured, and I trust gentlemen, that you will consider this case carefully—that you will consider very, very deliberately."

The case was tried on March 5, 6, 7, and 8, 1918. On these dates it was not necessary to inflame the passions of jurors by talking about the enemies of our country, rather was it a time to caution jurors against allowing their prejudices and patriotism from swaying their judgment. But the Assistant United States Attorney so far transcended his duty as a prosecuting officer that we are clearly of the opinion that the conviction of the defendant ought not to stand. The language used speaks for itself. It must have produced a situation in the minds of the jurors that destroyed a calm consideration of the rights of the defendant. The United States cannot afford to convict her citizens in this manner. There was no case against Kalis. The court directed a verdict in his favor on one count, and there was no evidence to

convict him on the other. His acquittal, therefore, cannot be urged in support of the proposition that the jury acted without prejudice.

The judgment below is reversed, and a new trial ordered.

(257 Fed. 394)

O. & W. THUM CO. v. A. K. ACKERMAN CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3161.

TRADE-MARKS AND TRADE-NAMES ⚷100—UNFAIR COMPETITION—SUFFICIENCY OF DECREE.

In suit to restrain unfair competition in the sale of sticky fly paper or fly coils, so as to infringe plaintiff's rights, decree approving the trade-name, the name of his commodity, and the designs submitted by defendant under which to continue business, and fixing the amount of bond required as a condition to permit the sale of stock previously manufactured by defendant, *held* sufficient as effectively protecting plaintiff's rights.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; Clarence W. Sessions, Judge.

Suit in equity by the O. & W. Thum Company against the A. K. Ackerman Company. From the decree, plaintiff appeals. Affirmed.

See, also, 254 Fed. 219.

This is an appeal from the decree entered in the court below upon mandate issued pursuant to opinion rendered, August 1, 1917, in the two cases of the present appellant against Dickinson and the Ackerman Company, respectively, which were commenced in separate jurisdictions and subsequently heard together in this court, as explained in 245 Fed. at page 610, 158 C. C. A. 37. The facts then pertinent to the cases and the reasons for the conclusions reached appear in that opinion, and a petition for writ of certiorari was denied in each case. 246 U. S. 664, 38 Sup. Ct. 334, 62 L. Ed. 928. The defendants in those cases, on November 26, 1917, presented to the court below a joint petition, bearing the titles of both the original cases, specifying the courts in which the cases had been brought, one in Michigan and the other in Ohio, and addressed to the "District Courts of the United States"; but it does not appear whether a similar petition was filed in the District Court for the Western District of Michigan. This joint petition, after setting out steps previously taken in this court, in substance states that the season of manufacture of sticky fly paper for the year 1918 was then at hand, and that it was necessary for the petitioner Dickinson to proceed with such manufacture at once; that Dickinson had caused to be prepared certain photographs, submitted with the petition, showing the name under which he proposed to continue his business and the name of the commodity manufactured by him, as well as the design which he proposed to use—presumably in the introduction and sale of his product. The petition further states that the business name so proposed would serve "effectually to qualify and explain" the trade-name Dickinson had previously used and "to distinguish" it from the name of the present appellant, and that the name so to be given to his commodity would serve "unmistakably to differentiate his product from plaintiff's," the appellant's, and prays (a) approval of the trade-name, the name of his commodity, and the design so submitted, and (b) an order fixing amount of bond required as a condition to permitting the sale of finished stock theretofore manufactured by Dickinson and bearing the names and marks in issue in appellant's former appeals.

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In our former opinion certain questions concerning the further use of Dickinson's trade-name and of the term he applied to his product were referred to the trial judge for determination (245 Fed. at page 627, 628, 158 C. C. A. 37); and the method adopted by the joint petitioners to present the issues involved in these questions was fairly within the practice sanctioned by this court in Kalamazoo Loose-Leaf Binder Co. v. Proudfit Loose-Leaf Co. (243 Fed. 895, 156 C. C. A. 407). It does not appear that appellant responded to the petition by motion, answer, or other pleading. It is, however, to be gathered from the contentions of counsel that the matters so referred to the trial judge were presented by both sides and heard in open court. In the assignments of error appellant sets up a number of objections to the decree, though in all material respects they are based on the conditions under which Dickinson is permitted by the decree to continue the use of his former trade name and of the term ("Sticky") he had applied to his commodity.

Fred L. Chappell, of Kalamazoo, Mich., for appellant.
Willard F. Keeney, of Grand Rapids, Mich., for appellee.

Before WARRINGTON, Circuit Judge, and COCHRAN and HOLLISTER, District Judges.

PER CURIAM. We are constrained to believe the decree is right:

1. The decree adjudges that "it is and will be an effective qualification and explanation" of the name under which "Dickinson conducts his business if, in association with and immediately following" his trade-name, viz. "'Grand Rapids Sticky Fly Paper Company,' * * * there be used" the name and word "Albert G. Dickinson, Proprietor," provided such name and word "be printed in type as large as that in which the words" of such trade-name "are printed." The change thus exacted is manifestly designed to break up the practice of concealing the real origin of the Dickinson product.

2. The decree also adjudges that "it is an effective qualification and explanation of the word 'Sticky' if the same be used in connection with the fly paper or fly coils manufactured" by Dickinson "as descriptive thereof, and not as heretofore as the name of a brand called 'Sticky,'" provided the word as thereafter used by Dickinson "upon his fly sheets, cartons, cases, and crates, vended by defendant (Ackerman Company) shall not be printed in larger type than the words 'fly paper' or 'fly coils' in connection with which it is used." The effect of this is to forbid further use of the word "Sticky" as a separate and distinct descriptive term; indeed, petitioners propose and one effect of the decree is to approve the use of "American Fli-Catch," instead of "Sticky," as a single descriptive term.

3. The decree recites the submission to the court by Dickinson of certain photographs, one showing what is to be displayed on the top and edges of the carton, another the design which is to be imprinted upon the fly sheets, including directions for the use of the paper and coils, and still another the design and also at each end a representation of the fly coil. They also show the name under which the business is to be continued and the name selected for the product, and the photographs are attached as exhibits in the order thus stated; and the decree adjudges that, if the business name and that of the product are used in the manner shown in these exhibits, they will sufficiently differentiate

Dickinson's business and product from appellant's, and that the design so shown "does not infringe the design of the plaintiff," the appellant.

It is not necessary to state further details of the changes so wrought. It is sufficient to say that other changes are made respecting the dress in which the Dickinson products are to be displayed in putting them on the market. Furthermore, the results of these changes are placed in definite and permanent form by the exhibits attached to the decree, and, in view of the part Dickinson has taken as a joint petitioner in this case, the decree would seem to be as effective in binding him as it is the Ackerman Company. This of itself is a distinct advantage to appellant, unless it is correct in its contention that Dickinson has no right at all to use the name under which he is permitted to continue his business or to use the word "sticky," even as such use is explained and restricted by the decree.

The truth is appellant seeks to reopen both of the original cases on these points. This is to overlook the contentions made on both sides and the decision rendered on both questions when the original cases were here. The officers controlling appellant will not see, much less do they appreciate, the significance of the geographic and descriptive character of the name, Grand Rapids Sticky Fly Paper Company, or of the years of acquiescence in Dickinson's use of the words as a trade-name. It hardly is necessary to try to add to what is said and, in the way of judicial decisions, cited in our original opinion on these subjects (245 Fed. at pages 625 to 627, 158 C. C. A. 37). Appellant's reiteration of its claim to an exclusive right in the name is not persuasive. The most that it ever obtained in an exclusive sense was through purchase of the stock in a corporation created under that name—true, a franchise to be and to act under such name—but this was lost through ouster (People v. Grand Rapids Sticky Fly Paper Co., 144 Mich. 221, 231, 107 N. W. 1119); and hence we still think the appellant's insistence is not aided by the purchase of the stock mentioned or the decision cited. It is to be added that appellant never used the name in the precise form to which it persists in claiming the exclusive right; certainly this course was not calculated to secure such a right. Plainly, then, it will not do to ignore the vital characteristics, the geographic and descriptive nature, of the name, nor the effect of appellant's acquiescence in Dickinson's use of it.

What appellant and its predecessors have done concerning the use of the name "Grand Rapids" and the words "sticky fly paper," and what rights they so acquired, were considered in our first opinion. The relief granted to appellant was bottomed on the fact, deducible from the record, that Dickinson adopted the trade-name in question, without disclosing his own name, for the purpose of getting some of appellant's business. 245 Fed. at page 625, 158 C. C. A. 37. Dickinson's initial intent was made plain by his subsequent progressive methods of imitating appellant's trade-mark, trade packages, and trade dress. Besides, we think the trade-name itself was calculated to enable him unduly to secure advantages from appellant's established business. The name told the story of years of effort on the part of the Thum Bros. to perfect the manufacture of sticky fly paper at Grand Rapids and to

build up a trade in their output, until Grand Rapids became known as "the home of sticky fly paper." The situation was peculiar and exceptional; it clearly called for disclosure of Dickinson's name as the producer of the sticky fly paper he was selling under the name "Grand Rapids Sticky Fly Paper Company"; he did not accompany his use of the trade-name with an explanation "so as to give the antidote with the bane."

Here we have an instance of defendants' refusal to see or to appreciate the effect of Dickinson's intent, like the refusal of appellant with respect to the characteristics of the name and the acquiescence in its use; this attitude of the parties, of course, results in dissatisfacion to each and involves considerations which must be balanced and met. It may be added that what has been said in respect of the trade-name sufficiently discloses our view of the restriction imposed by the decree upon the further use of the word "sticky." The question is not what relief appellant might have been entitled to in the beginning; it is what relief it is entitled to now. Appellant presents no suggestion in this behalf, except such as would require Dickinson to advertise his competitor's business; the decisions relied on are not applicable. We still think, as expressed in our first opinion, that the place to solve the problem was in the court below and upon full hearing.

Judge Sessions has after painstaking effort adopted a plan which in its entirety we believe will effectively protect appellant's rights; and accordingly the decree will be affirmed.

(257 Fed. 397)

UNITED STATES v. ROGERS et al.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1919.)

No. 5166.

1. EMINENT DOMAIN ⟹148—JUST COMPENSATION—INTEREST AS ELEMENT OF COMPENSATION.

An award for land taken under Reclamation Act June 17, 1902 (Comp. St. §§ 4700–4708), three years before condemnation proceedings were instituted under section 7 of the act (section 4706), *held* to properly include an amount equal to interest at the legal rate of the state until time of payment of the value of the land fixed by commissioners as of the date of the taking, not for interest as such, but as an element of the just compensation to which the owner is entitled under the Constitution.

2. UNITED STATES ⟹110—LIABILITY FOR "INTEREST."

In the rule of immunity of the government from liability for interest, the word "interest" is generally used as meaning compensation for the use or forbearance of money, or damages for its detention.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

3. EMINENT DOMAIN ⟹122—"JUST COMPENSATION."

"Just compensation" rests on equitable principles, and it means substantially that the owner should be put in as good position pecuniarily as he would have had, if his property had not been taken.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Just Compensation.]

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Condemnation proceeding by the United States against William E. Rogers and others. From the award of compensation, the United States brings error. Affirmed.

P. W. Dent, Dist. Counsel U. S. Reclamation Service, of El Paso, Tex. (S. Burkhart, U. S. Atty., of Albuquerque, N. M., and J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M., on the brief), for the United States.

J. M. Hervey, of Roswell, N. M. (W. C. Reid and George S. Downer, both of Albuquerque, N. M., on the brief), for defendants in error.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

HOOK, Circuit Judge. [1] This is a writ of error by the government to review awards in condemnation proceedings instituted by it in the court below. Act Aug. 1, 1888, c. 728, 25 Stat. 357 (Comp. St. §§ 6909, 6910); Reclamation Act June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. §§ 4700–4708). The only questions involved are whether the landowners are entitled to interest as part of the awards, and, if so, from what time and at what rate?

Lands of the defendants in error in New Mexico were appropriated by the government for public use in a reclamation project. They were actually taken by flooding on April 19, 1912, and private use and enjoyment thereafter were destroyed. Formal proceedings in condemnation were not begun until January 18, 1915, when the government filed its petition in the court below for that purpose. The petition expressly averred that the lands "were flooded and thereby appropriated by the government of the United States" on April 19, 1912, but that no compensation had yet been paid. The prayer of the petition asked, among other things, that the lands be decreed to be the property of the government "from the date of the said taking or the appropriation thereof." Commissioners were appointed to assess the damages. Their report, February 23, 1917, was confirmed by the court, and on July 27, 1917, the government was directed to pay the awards to the clerk for the benefit of the defendants in error. The commissioners followed the customary practice of valuing the property as of the time of appropriation, and they therefore stated in their report that the amounts awarded were as of April 19, 1912; also that they had included therein no interest to the time the government's petition was filed or to the date of their report. Upon motion of the defendants in error the court, by supplemental order on October 1, 1917, required the government to deposit with the clerk, in addition to the amount of the awards, a sum equal to interest thereon at 6 per cent. per annum from April 19, 1912, to the time the deposit was made. The addition required was not interest as such, but a sum equal to interest.

It is urged that no interest can be allowed against the United States in a condemnation case for any period prior to final judgment, or for

any period prior to an order of the court placing the United States in possession of the lands condemned; also that, irrespective of the time for computation, there is no authority of law for a rate of 6 per cent. Among the many authorities relied on is United States v. Bayard, 127 U. S. 251, 260, 8 Sup. Ct. 1156, 1161 (32 L. Ed. 159), where the court said:

"It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

Section 177 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1141 [Comp. St. § 1168]; Rev. Stats. § 1091) provides:

"No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

Without further reference to the many authorities cited, it may be said that the position of the government is fully illustrated by the above excerpt and statute. We think that the question is settled in this court by United States v. Sargent, 89 C. C. A. 81, 162 Fed. 81, in which interest at 6 per cent. was allowed in a similar case as a part of the "just compensation" required by the Fifth Amendment to the Constitution. In the matter of the time and the rate of interest, the court followed the rule in Minnesota, where the property was located and the condemnation proceedings were had. The case was taken to the Supreme Court, but was afterwards dismissed on the motion of the Solicitor General. In New Mexico, where the case at bar arose, the legal rate is 6 per cent. In Atchison, T. & S. F. R. Co. v. Richter, 20 N. M. 278, 148 Pac. 478, L. R. A. 1916F, 969, it was held that the owner should have interest "from the time his possession is invaded * * * either with or without an order of court."

[2] In the rule of immunity of the government from liability for interest, the term "interest" is generally used as meaning compensation for the use or forbearance of money, or damages for its detention. But the position of the government in the case at bar is not like that which it occupies when a claim or demand on contract is asserted against it. True, it is said that, when the government takes possession of private property for public use in advance of formal proceedings in eminent domain, the right of the acquiescing owner arises ex contractu (United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846); but that is by way of implication that compensation is intended by the government, instead of a trespass for which the landowner has no enforceable remedy. The duty and obligation to make just compensation in such a case is fundamental, and whatever is an essential element in that compensation cannot be excluded, even by legislative enactment. The question of compensation is a judicial one. Monongahela Navigation Co. v. United States, 148 U. S. 312, 327, 13 Sup. Ct. 622, 37 L. Ed. 463.

[3] Just compensation rests on equitable principles, and it means substantially that the owner should be put in as good position pecuniarily as he would have had if his property had not been taken. United States v. Nahant, 82 C. C. A. 470, 153 Fed. 520. When in the exercise of its sovereign power the government actually appropriates and takes possession of private property in advance of proceedings in condemnation, interest from the time of taking is in a sense a convenient commutation of the value of the use of the property or the direct loss the owner sustains until the value of the property itself is paid by deposit in court or otherwise. Something of substance is lacking in an award that omits all consideration of the time of the prior actual taking. That would be obvious in the case of a completed office building, and the difference here is but in degree, not in principle. An instance in which interest was regarded as an integral part of the principal sum in issue, and not within the statutes and decisions exempting the government, may be found in United States v. New York, 160 U. S. 598, 619, 16 Sup. Ct. 402, 40 L. Ed. 551. That was not a case of appropriation of private property, but there is a relevant analogy. In United States v. Cress, 243 U. S. 316, 319, 37 Sup. Ct. 380, 61 L. Ed. 746, the judgment of the District Court, which was affirmed, embraced interest, but the period for which it was allowed does not definitely appear. United States v. First Nat. Bank (D. C.) 250 Fed. 299, Ann. Cas. 1918E, 36, is in point. There the government took possession of property some months before commencing condemnation proceedings in the District Court. In instructing the commissioners respecting their duties the court said:

> "The sole question for you to determine, in each one of the cases, is the value of the lands and the property at the time of the actual taking and occupation by the United States, together with interest at the rate of 8 per cent. per annum, the legal rate in Alabama, on said sums so ascertained by you, from the date of such actual taking and occupation."

The proceedings in that case were under Act July 2, 1917, c. 35, 40 Stat. 241 (Comp. St. 1918, § 6911a), which provided that they should "be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted." But, as regards the essential elements of the just compensation to be paid, the requirement is not different from the conformity provisions of section 2 of the act of August 1, 1888, supra, applicable to the case at bar.

The order is affirmed.

(257 Fed. 401)

UNITED STATES v. HIGHSMITH.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1919.)

No. 5263.

EMINENT DOMAIN ⟹148—JUST COMPENSATION—INTEREST AS ELEMENT OF COMPENSATION.

That a landowner did not institute proceedings to recover compensation for land appropriated by the United States for public use does not debar him of the right to interest from the date of taking, as part of the compensation, since the permanency of the occupation is not always disclosed, or not even finally determined.

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Condemnation proceeding by the United States against Margie L. Highsmith and others. From the award of compensation, the United States brings error. Affirmed.

P. W. Dent, Dist. Counsel U. S. Reclamation Service, of El Paso, Tex. (S. Burkhart, U. S. Atty., of Albuquerque, N. M., and J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M., on the brief), for the United States.

J. M. Hervey, of Roswell, N. M. (W. C. Reid and George S. Downer, both of Albuquerque, N. M., on the brief), for defendant in error.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

HOOK, Circuit Judge. This case is like United States v. Rogers (No. 5166) 257 Fed. 397, 168 C. C. A. 437, just decided, except in the following particulars: Both the United States and the landowner, Margie L. Highsmith, appealed from the award of the condemnation commissioners to the District Court, where the case was tried to a jury. The parties having agreed that the question of interest on the amount awarded was one of law for the court, it instructed the jury that interest should be allowed, and a verdict was so returned. It was also agreed that the court should make a separate order requiring the deposit of interest, so that the government might prosecute a writ of error to review that matter only. That was accordingly done. Finally it was stipulated:

"That although the lands were appropriated on April 19, 1912, and used thereafter by the United States, no order was entered by the court formally placing the United States in possession of the same, except that contained in the final judgment entered on January 30, 1918."

We do not regard these differences as material, or calling for a conclusion different from that announced in the other case. The government took title and possession, and the landowner was deprived of both on April 19, 1912. The final judgment of the court did not change that situation. True, a landowner might himself commence suit and thereby hasten the day of payment, but one objection to making that a

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requisite is that the purpose of the government, whether a permanent appropriation or a temporary occupancy, is at times not disclosed, or even not finally determined.

The order is affirmed.

(257 Fed. 402)

PAGE et al. v. OLD DOMINION TRUST CO.

In re PIZZINI.

(Circuit Court of Appeals, Fourth Circuit. February 8, 1919.)

No. 1663.

BANKRUPTCY ⟹188(3)—EQUITABLE LIEN.

Where bankrupt, after recording a trust deed securing his notes, which latter he delivered to payee, retained the deed and executed other notes purporting to be those secured by it, upon which he borrowed money from a bank, not only was the lien of the first payee on the mortgaged property a prior one, but the bank acquired no equitable lien on the property superior to the claims of unsecured creditors as represented by bankrupt's trustee, especially since Code Va. 1904, § 2463, makes parol liens void as against creditors.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond, in bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of William B. Pizzini, bankrupt; the Old Dominion Trust Company, trustee. L. R. Page and the Old Dominion Trust Company, trustees for C. D. Langhorne, appeal from an order denying them a lien. Affirmed.

Robert E. Scott, of Richmond, Va. (Page & Leary and Scott & Buchanan, all of Richmond, Va., on the brief), for appellants.

Norvel L. Henley, of Williamsburg, Va. (Brockenbrough Lamb, of Richmond, Va., and Henley, Hall, Hall & Peachy, of Williamsburg, Va., on the brief), for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. In this appeal is to be determined the proper application of the proceeds of the sale of a lot of land in the city of Richmond sold by order of the court in the administration of the estate of William B. Pizzini, bankrupt. The facts are not in dispute. On June 15, 1914, Pizzini conveyed the lot to H. K. Franklin, trustee, to secure seven notes, one for the principal sum of $15,000, payable three years after date, and six notes, for $450 each, for the semiannual interest, all payable to bearer at the National State & City Bank, Richmond, Va. On the notes was an indorsement to the effect that they were secured by the deed of trust. On July 1, 1914, William B. Pizzini, as payment of past indebtedness and for cash paid at the time. delivered the notes and the deed of trust to his uncle, Louis W. Pizzini. Louis W. Pizzini returned the deed of trust to William B. Pizzini, to be

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by him delivered to the clerk of the chancery court for record. On July 3, 1914, William B. Pizzini gave to Louis W. Pizzini the clerk's certificate of record, but retained the deed of trust.

In January, 1915, William B. Pizzini applied to the Old Dominion Trust Company for a loan of from $12,500 to $15,000, to be secured by a first mortgage or trust deed on the same property. Upon examination of the title, the trust company found that it was incumbered only by the trust deed to Franklin. Falsely representing that the notes and trust deed securing them were held by his bank as security for a small loan, and pretending to wish to avoid the expense of new papers, Pizzini proposed to pay the small debt to the bank, give to the trust company his note for $12,500, and deposit as collateral the trust deed to Franklin, the notes it secured, and the policy of insurance on the property. Upon acceptance of this proposition, Pizzini gave to the trust company his note for $12,500, dated February 18, 1915, payable two years after date, and four notes representing the semiannual interest thereon. At the same time he turned over as collateral to the trust company the trust deed made to Franklin, and notes signed by himself exactly answering to the description of those secured by the trust deed, representing that they were the genuine notes. Upon this apparent security and no other the trust company lent $12,500 money of C. D. Langhorne, which it held in trust for investment.

After the adjudication in bankruptcy, it was discovered that Louis W. Pizzini held the genuine notes secured by the trust deed. At the sale made by order of the court, the property brought $24,700. In the contest over the proceeds it was at first contended by the Old Dominion Trust Company that it was entitled to be paid in preference to Louis W. Pizzini; but that issue was decided against the trust company, and there is now no dispute that Louis W. Pizzini is entitled to be first paid out of the proceeds. The present claim of the Old Dominion Trust Company is to the surplus proceeds of sale as against the trustee in bankruptcy, representing the unsecured creditors. The referee reported against the claim of the trust company, and this report was confirmed by the District Court.

The position taken by the appellant is that the transaction between Pizzini and the trust company shows an intention of Pizzini to give, and of the trust company to take, a lien on the lot to secure the loan of $12,500, and that the court should effectuate that intention by holding the transaction to be an equitable lien or mortgage entirely outside of and beyond the trust deed, superior to the claims of the trustee standing in the position of a judgment creditor. It is not pretended that there was any written agreement to give any lien to the trust company, except that which was represented by the deed of trust to Franklin, and therefore, if any lien was intended, it must have been a lien created by parol. It is impossible to support such a claim either on principle or authority.

Prior to the enactment of section 2463 of the Code of Virginia, a lien might be created by a parol agreement even as against subsequent judgment creditors without notice. Floyd v. Harding, 69 Va. (28 Grat) 401. This anomalous condition of the law, by which a parol agreement

for a lien took precedence of subsequent judgment liens, while a written unrecorded mortgage did not, was remedied by that section of the Code which provides:

"Every contract, not in writing, made, in respect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, shall be void, both at law and in equity, as to purchasers for valuable consideration without notice and creditors." Norfolk & Portsmouth T. Co. v. White, 113 Va. 102, 73 S. E. 467, Ann. Cas. 1913E, 655.

Straley v. Esser, 117 Va. 135, 83 S. E. 1075, and Young v. Holland, 117 Va. 433, 84 S. E. 637, earnestly relied on by appellant, have no application. These cases only decide that the recording statutes and section 2463 do not protect judgment creditors against a resulting trust or an express trust created by a grantee at the time of the conveyance by his contract, expressed or implied, to the effect that he would hold the land for another who had paid the purchase money. There was no semblance of an agreement in this case that Pizzini would hold the lot in trust for the Trust Company. Nor does Charlottesville Hardware Co. v. Perkins, 118 Va. 34, 86 S. E. 869, affect the question, for it merely reaffirms the Virginia doctrine that the lien of a judgment attaches only to whatever interest the debtor has, and that where a conveyance and mortgage for the purchase money are interdependent parts of the same transaction the interest of the grantee vests subject to the mortgage, which, although unrecorded, cannot be displaced by judgments against the grantee.

But, laying aside section 2463, it is perfectly clear that there never was any intention by Pizzini to give, or by the trust company to take, a parol agreement for a lien as security. Nor was there any promise on the one side, or expectation on the other, that another mortgage or deed of trust should be executed, or that another lien should be given in any form; and this obviously distinguishes the case from Dulaney v. Willis, 95 Va. 608, 29 S. E. 324, 64 Am. St. Rep. 815. To warrant a court in holding that an equitable lien was created, "equity requires a clear mutual understanding and a positive assent on the part of each party. An offer must be accepted in the terms and form submitted, or there is no valid assent such as will create a contract which may be specifically enforced." Creecy v. Grief, 108 Va. 320, 61 S. E. 769, and Shield v. Adkins, 117 Va. 619, 85 S. E. 492. The transaction shows on its face that the sole intention of Pizzini, which he carried out, was to obtain the money of the trust company without any security, on the deception that he controlled and could confer upon the trust company the security of the trust deed executed to Franklin. That this was his intention, and that the trust company relied alone on the security of the trust deed already given to Franklin, is made the more evident by the fact that the original plan of executing another security was abandoned and reliance on the trust deed already executed substituted. The obtaining of money by Pizzini, by representing that he owned or controlled a certain piece of property, namely, the trust deed, was nothing more than the ordinary case of obtaining money under false pretenses.

The court is not asked to carry out the real agreement that the trust company should have the security of the trust deed executed to Franklin, for that is impossible. The position submitted is that the court has the power which equity requires it to exercise against lien creditors of creating another lien, not thought of by the parties, because that upon which the trust company relied turned out to belong to some one else. Judicial power does not extend to that point.

Equities against Pizzini to require him to make good his representation to the trust company that he was giving a good title to the Franklin trust deed cannot operate to estop the trustee in bankruptcy representing the interest of creditors for whose protection the recording acts, and section 2463 of Virginia Code were intended. Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642–648, 36 Sup. Ct. 466, 60 L. Ed. 841.

Affirmed.

(257 Fed. 405)

THE NEW YORK CENTRAL NO. 18.

THE AMANDA MOORE.

(Circuit Court of Appeals, Second Circuit. February 14, 1919.)

No. 152.

1. COLLISION ⟹9, 73—SUIT FOR DAMAGES—VIOLATION OF HARBOR RULE—VESSEL LYING AT END OF PIER.

   New York City Charter, § 879, providing that no vessels shall lie at the end of piers, "except at their own risk of injury from vessels entering or leaving any adjacent dock," while not binding on courts of admiralty to the extent of absolutely preventing recovery, is recognized by them as establishing a valid harbor rule, a violation of which is evidence of negligence, and casts on the violator the burden of showing affirmatively that the violation did not contribute to its injury.

2. COLLISION ⟹9—DEFENSES TO SUIT—VESSEL LYING AT END OF PIER.

   A violation by a vessel of the New York harbor rule against lying at the end of a pier can be invoked only by vessels entering or leaving an adjacent slip, the risk of injury from which under the statute such vessel assumes, and they are not exempted from the duty to exercise proper care.

3. TOWAGE ⟹11(6)—INJURY TO TOW IN COLLISION—LIABILITY OF TUG.

   A tug cannot be held liable for injury to her tow by collision, because she tied the tow at the end of a pier, where it was done with the express consent of the owner.

4. COLLISION ⟹72(2)—TUG MOVING OUT OF SLIP AND SCOW LYING AT END OF PIER—FAULT.

   A collision between a tug moving out of a slip and a scow held by her towing tug at the end of an adjacent pier *held* due to faults of all three vessels.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by Fred E. Jones, owner of Scow No. 33, against the steam tug New York Central No. 18, with the steam tug Amanda Moore impleaded. Decree for half damages against the Moore, and libelant appeals. Reversed, with directions to distribute damages between libelant and both tugs.

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Libelant owns the scow No. 33. On a fair summer day, the tide being strong flood, she was in tow of the tug Amanda Moore. It was intended to take the scow into the slip between Piers 32 and 33, East River. The slip, however, was already occupied—at least by the tug New York Central No. 18, engaged in pulling out the lighter Black Rock. To give No. 18 time to execute her maneuver before towing No. 33 into the slip, the Amanda Moore landed libelant's scow on the end of Pier 33, making her fast in such manner that her end nearest the slip was about 15 feet from the lower outer corner of Pier 33.

This procedure was in violation of section 879 of the Charter of New York City (Laws 1901, c. 466), quoted in The Allemania, 231 Fed. 942, 146 C. C. A. 138, which declares that no vessels shall lie in the position that No. 33 occupied, "except at their own risk of injury from vessels entering or leaving any adjacent dock or pier." Tug No. 18 put a line from her own bow upon the Black Rock and backed out of the slip, blowing a slip whistle as she went. As the tug passed out of the slip, the full force of the tide struck her broadside, and threw the tug against the end of No. 33, causing the damages sought to be recovered in this action. The libelant testified that he knew his scow was going to the slip in question, and that he had, if not instructed, at least authorized, those in charge of the Amanda Moore to tie up his scows (and among others the 33) at the ends of piers. He was specifically asked whether in these instructions he included the end of the "pier as well as the inside of the slip," and he answered in the affirmative. It did not appear that the navigator of the Amanda Moore was aware of this order or willingness of the libelant; the same having been communicated by libelant to the owner of that tug.

It is inferable from the record that libelant's scow had no crew; she was wholly in charge of the Amanda Moore, and the line to the pier end was thrown out and made fast by a tug deckhand. The court below dismissed the libel as to New York Central No. 18, and gave half damages to libelant against the Amanda Moore. From this decree libelant alone appealed.

Henry E. Mattison and Park & Mattison, all of New York City, for appellant.

George E. Hargrave, T. Catesby Jones, and Harrington, Bigham & Englar, all of New York City, for the New York Central No. 18.

George Whitefield Betts, Jr., Robert McLeod Jackson, and Hunt, Hill & Betts, all of New York City, for the Amanda Moore.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

HOUGH, Circuit Judge (after stating the facts as above). [1] Section 879 of the charter is to be construed and applied as required by our previous decisions (The Allemania, supra, The Dean Richmond, 107 Fed. 1001, 47 C. C. A. 138, and The Chauncey M. Depew, 139 Fed. 236, 71 C. C. A. 362). It does not absolutely prevent a vessel lying at the pier end from recovering against manifest tort-feasors. But a violation of the statute is sufficient evidence and sufficient reason for imputing fault to the violator. The consequence of such violation is, by the statute, that the violator cannot recover for injuries inflicted by a vessel "entering or leaving any adjacent pier"—i. e., slip. Our decisions quoted above hold that this absolute prohibition of recovery does not bind the courts of the United States, at least sitting in admiralty; but we have fully recognized the statute as establishing a valid rule for the management of the harbor. A departure therefrom, like a departure from any other legal rule, is evidence of negligence, and casts on the violator the burden of showing affirmatively that the violation did not contribute to the injury giving rise to suit.

[2] Undoubtedly such violation of rule can be invoked only by vessels of the class enumerated by the statute, viz. those "entering or leaving" a slip adjacent to the pier end at which the offender lies; and even a violation of rule does not give any one the right to dispense with care, and treat a vessel wrongfully at the pier end as an outlaw. The Cincinnati (D. C.) 95 Fed. 304.

The statement made in Wright, etc., Co. v. New England, etc., Co. (D. C.) 189 Fed. 813, that the statute does not make lying at a pier end illegal, is true, in the sense that no crime is thereby committed; but, if construed to mean that no valid rule is established by the enactment, it is erroneous. That case was affirmed in 204 Fed. 762, 125 C. C. A. 129, and the point of statutory violation was disposed of by referring to The Rhein, 204 Fed. 252, 122 C. C. A. 520, in which case it was held that the statute was not applicable; nor was it in the Wright Case, though for a different reason.

But out of the language, not the facts, of the last two cases cited, there seems to have developed an impression that lying at a pier end is, even as to vessels entering and leaving the adjacent slips, not a fault, unless there be some other and special circumstances making the prohibited position dangerous to others. This is incorrect, and anything to that effect in The Stella (D. C.) 243 Fed. 220, and The Daniel McAllister (D. C.) 245 Fed. 188, must be regarded as erroneous.

[3] The ground upon which half damages against the Amanda Moore were allowed below was that that tug violated the statute with libelant's consent. This is true; but we are unable to perceive that libelant has any cause of action against the Amanda Moore for doing exactly what he distinctly told the tugboat owners they might do when he employed them. It was therefore no fault (in respect of this libelant) for the Amanda Moore to fasten the scow at the pier end.

[4] But the duty of the tug was not confined to merely pausing at the slip entrance until No. 18 could get out. She was obliged to take such steps as good navigation required while she was there. Therefore the question of fact is whether there was any error of navigation on the part of either No. 18 or the Amanda Moore while the former was pulling out the Black Rock—an operation admitted on all sides as not easy, owing to the narrowness of the waters and congestion in the slip.

The tide was running about five knots. It was sure to hit heavily on the broadside of any vessel emerging from the slip. The Moore had fastened her scow and herself with only a single line, and it was quite possible to slack off the line in an instant and let both scow and tug drift away with the tide.

The master of No. 18 saw what was at the end of the pier, blew his whistle, and says that he did not think he would strike the scow, because "I thought he would slack up with the line"; but he held no conversation with the master of the Moore, whom he saw, never asked him to do what he says he expected would be done, and (in short) went ahead on the chance that all would be well.

The master of the Moore saw the No. 18 coming, and says that he did not cast off his line and drop back with the tide, "because I thought

she had room enough to go up clear," which was exactly what the No. 18's master knew did not exist.

The No. 18 put on full speed and attempted to execute a maneuver which could not succeed unless the master of the Moore co-operated with him; but no means of co-operation were suggested. It was left to divination.

In our opinion the No. 18 was at fault for close shaving, and not attempting to get the Moore to remove herself and scow, and the Moore for not executing an obvious maneuver, which would certainly have mitigated and might have avoided collision.

Therefore all parties to this action were at fault, and it is ordered that the decree appealed from be reversed, with one bill of costs in this court against the two tugs jointly, and the cause be remanded with directions to distribute the damages between the libelant and both tugs, upon the principles enunciated in The Harold (D. C.) 84 Fed. 704, and The Lyndhurst (D. C.) 92 Fed. 682.

(257 Fed. 408)

SUMPTER LUMBER CO. v. SOUND TIMBER CO.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3283.

1. APPEAL AND ERROR ⟹330(2)—CIRCUIT COURTS OF APPEALS—SUBSTITUTION OF PARTIES.

   A Circuit Court of Appeals has jurisdiction to entertain an original application for substitution of parties in a suit which has been brought into that court by appeal, regardless of the action of the District Court in denying a similar application.

2. APPEAL AND ERROR ⟹95—APPEALABLE ORDERS.

   An order of a District Court denying an application by a stranger to be substituted as complainant in a suit is not appealable.

3. APPEAL AND ERROR ⟹330(2)—SUBSTITUTION OF PARTIES IN APPELLATE COURT.

   Where the interests of a party to an appeal devolve upon another, either by operation of law or act of the parties, the person acquiring such interests will usually be allowed to be substituted, and to prosecute or defend the appeal in place of the original party.

4. APPEAL AND ERROR ⟹373(1), 397—DISMISSAL OF APPEAL—GROUNDS.

   An appeal will not be dismissed, on the ground that no citation was served and no bond filed in the court below, when the appeal was taken in open court and bond has been filed in the appellate court.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in equity by the Sumpter Lumber Company against the Sound Timber Company. Decree for defendant, and complainant appeals. On motion for substitution of parties, and motion to dismiss appeal. Motion for substitution granted, and motion to dismiss denied.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

W. F. Hays, of Seattle, Wash., for appellant.

Peters & Powell and John H. Powell, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. W. F. Hays, who was the attorney for the appellant in the court below, moves this court for an order that he be substituted as the party appellant in the above-entitled suit. The cause was tried on its merits in the court below, and on April 19, 1918, decision was announced, and the appellant in open court gave notice of its appeal. The form of decree was taken under advisement, and the decree was entered on April 29th, and the appellant was required to file a supersedeas bond on the appeal in the sum of $10,000. On November 19, 1918, an order was made that the appellant's appeal be allowed, and that, instead of giving a supersedeas bond, it might give its bond for costs in the sum of $500, and thereafter, upon extensions of time, the transcript was filed in this court on January 14, 1919. In the meantime, and before the filing of a bond on appeal, Hays moved the court below for an order that he be substituted as the party plaintiff and appellant in said cause, which motion was denied on January 6, 1919.

The appellant makes no objection to the motion now made in this court, but the appellee opposes the same on the ground that a similar motion made in the court below was denied, and that Hays' only remedy is by appeal from that order. The ground of the motion for substitution, as shown by affidavits, is that Hays is the real party in interest in the said suit; that he obtained a judgment on June 13, 1908, and in pursuance of such judgment, he purchased on execution the defendant's interests in certain real estate, and received from the sheriff certificates of sale; that on November 19, 1908, he conveyed all rights under said certificates to Henry Hewitt, under a contract with Hewitt whereby, upon the quieting of the title to said lands, Hewitt was to pay to him $42,500 and reconvey to him an undivided one-half interest in the lands; that Hewitt was the president of the appellant herein, and that he conveyed said lands to the appellant, the stock of which he was the sole owner, and that the present suit to quiet title to said lands was accordingly commenced in the name of the appellant; that Henry Hewitt died on May 2, 1918, and his successors in interest thereafter, and after the appeal had been taken in open court, refused to prosecute the appeal, and that Hays was not aware of their purpose to abandon the appeal until about the time of his application to the court below for an order of substitution; and that the said corporation now has no intention to prosecute the appeal, and has abandoned and disclaimed any interest in the subject-matter of the litigation.

The appellee points to the fact that Hays was aware, soon after the entry of the decree in the court below, that the appellant would take no further steps toward the prosecution of the appeal. To this it is to be said that the appellant has not at any time instructed its

counsel to abandon the appeal or to dismiss the same. Hays, as its counsel, undoubtedly had the right to take the appeal. It is not disputed that he had an understanding with the president of the appellant that an appeal should be taken in case of an adverse decision. The appeal has now been perfected, and a bond for costs has been filed in this court, and the appellant is still properly a party to the appeal.

[1] The principal question here is whether Hays' right of substitution is foreclosed by the order denying him substitution in the court below. We are not advised of the ground on which the order was denied. It may have been denied on the ground that the jurisdiction of this court had attached upon the allowance of the appeal, notwithstanding that a bond had not been given. Evans v. State Bank, 134 U. S. 330, 10 Sup. Ct. 493, 33 L. Ed. 917; Southern Pine Co. v. Ward, 208 U. S. 126, 28 Sup. Ct. 239, 52 L. Ed. 420. But, however that may be, this court has jurisdiction to entertain original applications for substitution (Howard v. United States, 102 Fed. 79, 42 C. C. A. 169; Chicago G. W. Ry. v. First Methodist Episcopal Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488; Southern Pine Co. v. Ward, supra), and the action of the court below cannot affect that jurisdiction.

[2, 3] We find no merit in the contention that the right now to move for substitution was lost by the failure to appeal from the order of the court below denying substitution. Hays had no capacity to appeal from that order, and such an order is not appealable. 3 C. J. 477; Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49; Ex parte Cockcroft, 104 U. S. 578, 26 L. Ed. 856; Guion v. Insurance Co., 109 U. S. 173, 3 Sup. Ct. 108, 27 L. Ed. 895; Sliscovich v. Scandinavian-American Bank, 78 Wash. 660, 139 Pac. 606. The proposed substitution makes no change in the cause of suit. It can cause no prejudice to the rights of the appellee, and we see no reason why it should not be allowed.

"Where the interests of a party to an appeal or writ of error devolve upon another, either by operation of law or by act of the parties, a person acquiring such interests will usually be allowed to be substituted, and to prosecute or defend the appeal or writ in place of the original party, if the proper steps are taken in accordance with the practice in the particular jurisdiction." 3 C. J. 1031; Bowden v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386.

[4] The motion for substitution will be allowed, and the appellee's motion to dismiss the appeal, on the ground that no citation was served and no bond filed in the court below, will be denied, since the appeal was taken in open court, and a bond has been filed in this court.

(257 Fed. 411)

INTERNATIONAL HARVESTER CO. OF AMERICA v. PATTERSON et al.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919. Rehearing Denied June 2, 1919.)

No. 5209.

1. GUARANTY ⟹25(3)—CONSIDERATION—EVIDENCE.
The words "for value received," in an indorsement of guaranty, affirmatively express a consideration, which casts upon the guarantor the burden of proving that there was none, and a mere denial that anything was paid him does not discharge it.

2. CORPORATIONS ⟹218—STOCKHOLDERS—GUARANTY OF CORPORATION'S NOTE—CONSIDERATION.
A guaranty of renewal notes of a corporation, of which the guarantor was a stockholder and also a creditor in a substantial amount, by which an extension of the debt was secured, *held* supported by a valuable consideration.

3. MORTGAGES ⟹25(3)—VALIDITY—CONSIDERATION.
The release of a guarantor from a valid contract of guaranty and the surrender to him of guaranteed notes to the amount of the mortgage *held* to constitute a valid consideration for his personal notes for a portion of the debt and a mortgage securing the same.

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit in equity by the International Harvester Company of America against Henry Patterson and others. Decree for defendants, and complainant appeals. Reversed.

Thomas J. Doyle, of Lincoln, Neb. (H. P. Atwater, of Sturgis, S. D., on the brief), for appellant.

John L. Cleary, of Grand Island, Neb. (Clarence L. Lewis, of Rapid City, S. D., on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This is an appeal by the International Harvester Company from a decree denying it relief in a foreclosure suit upon notes and a mortgage given by defendant Patterson. The interest of defendant Miner is unimportant, and further reference to her may be omitted. The defenses appear from the findings of the trial court, which may be briefly summarized as follows: (1) That defendant Patterson was incapable of exercising a deliberate judgment, because of mental and physical weakness, though not lacking contractual capacity; (2) that he was imposed upon in the sense that he was overpersuaded against his own interest; (3) that his guaranty of certain prior notes, in part renewal of which the notes and mortgage in suit were given, was without consideration, therefore the latter were likewise without consideration; and (4) the notes and mortgage sued on were obtained by a false and fraudulent representation.

Defendant was a rancher, and had been fairly well to do before becoming involved in a mercantile venture by a corporation named Con-

sumers' Supply Company, which he and others organized, and which finally became insolvent. He was the president of the company and owned $1,000 of its capital stock, of a total issue of $7,000. The conduct of its business was intrusted to one Tivis as manager, who held $5,000 of stock and was largely responsible for its lack of success. On May 21, 1913, defendant's company owed the plaintiff $17,600 on notes executed prior to that time, and new notes were then taken for the amount, with the indorsement of Tivis and defendant as guarantors. This appears to have been the inception of defendant's individual liability to the plaintiff, and the first and second findings of the court above enumerated were addressed to that transaction. When defendant guaranteed the renewal notes of May 21, 1913, he was about 62 years of age and was suffering from neuralgia; but the evidence clearly shows that he was mentally and physically competent to contract, and knew what he was doing at the time. His guaranty of the notes of his company may not have been wise from a personal standpoint, but no imposition in a legal sense, such as is required to avoid a contract, was practiced upon him. He was evidently influenced in large measure by Tivis, his associate in business, upon whose advice and solicitation he had been accustomed to act; and there was no improper collusion between Tivis and the representative of the plaintiff, who was present and participated in the transaction. If men are competent to contract, and do contract, a court cannot relieve them from their obligations because in its view they acted unwisely.

[1, 2] Was defendant's guaranty of the notes of his company without consideration? The words in the indorsements of guaranty, "for value received," affirmatively express a consideration. The burden of proving there was none was on defendant, and a mere denial that anything was paid him does not discharge it. There are other kinds of consideration. The notes guaranteed were renewals of prior notes, and the reasonable inference is that the plaintiff granted and the debtor company secured an extension of time. Forbearance, renewal, or extension of an old debt, or a suspension of a right, is universally recognized as a legal consideration for new contractual conditions. Nor is it necessary that the benefit of the consideration should accrue to the promisor. Violett v. Patton, 5 Cranch, 142, 3 L. Ed. 61. This is especially so in cases of sureties and guarantors. It would be sufficient if the entire benefit accrued to the debtor company; but defendant had a personal interest in the transaction. He was not only a stockholder of his company, but also a creditor in a substantial amount (about $10,000), and consequently was individually interested in what concerned it, though indirectly and to a less degree. A valuable consideration, however small or nominal, given or stipulated for in good faith and in the absence of fraud, will support a contract of guaranty. Lawrence v. McCalmont, 2 How. 426, 452 (11 L. Ed. 326); Davis v. Wells, 104 U. S. 159, 167, 26 L. Ed. 686. The above are old rules, and according to them it cannot be said defendant's guaranty was without consideration.

[3] *The Notes and Mortgage in Suit.*—On May 21, 1914, when the $17,600 of guaranteed notes had matured, an adjustment was made by

which defendant executed to plaintiff his individual notes, aggregating $5,355.50, and a mortgage to secure them, an equal amount of the preceding notes were surrendered to him, and he was released from his guaranty of the others. The plaintiff and Tivis, acting for his company, settled the balance of the guaranteed notes by the former taking implements, etc., at an agreed discount from sale price and a new note of the company for the balance. The notes for $5,355.50, and the mortgage, given by defendant, are the instruments in suit. As already observed, the trial court held they were without consideration, because there was no consideration for defendant's guaranty of their predecessors. What we have said disposes of that defense. But further, in Lawrence v. McCalmont, supra, the Supreme Court says:

"In Brooks v. Haigh, 10 Ad. & E. 309, 323, the court held that a surrender by the guarantee of a former guaranty, even if it was not of itself binding upon the guarantor, was a sufficient consideration to take the case out of the statute of frauds and to sustain a promise made on the footing thereof."

The individual notes in suit are upon the footing of the prior guaranty which was surrendered by the plaintiff.

Finally, it is urged that an agent of plaintiff induced defendant to execute the notes and mortgage by falsely representing that his (defendant's) attorney said it was the best thing he could do. We think this defense is an afterthought. The preponderance of the testimony of witnesses is against it, and is confirmed by defendant's conduct before and after the transaction.

The decree is reversed, and the cause is remanded, for a decree in favor of the plaintiff.

(257 Fed. 413)

NOKIS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919.)

No. 5257.

1. PROSTITUTION ⟹5—VIOLATION OF WHITE SLAVE TRAFFIC ACT—QUESTION FOR JURY.

   Evidence in a prosecution for violation of the White Slave Traffic Act (Comp. St. § 8812) *held* sufficient to warrant submission of the case to the jury.

2. CRIMINAL LAW ⟹338(3)—TRIAL—EVIDENCE.

   That a defendant could not read or write English did not render letters purporting to have been written by him inadmissible, under instruction that they should be considered only if the jury found that they were written at the direction of and for defendant.

3. CRIMINAL LAW ⟹823(2)—TRIAL—INSTRUCTIONS—CURE OF ERROR.

   A recital by the judge to the jury of the evidence, although not in all respects correct, was not reversible error, where the jury were told that it was only his recollection, and not binding on them.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Criminal prosecution by the United States against Chris Nokis. Judgment of conviction, and defendant brings error. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

C. R. Jones and George G. Yeaman, both of Sioux City, Iowa, for plaintiff in error.

F. A. O'Connor, U. S. Atty., of Dubuque, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. Chris Nokis was convicted and sentenced for violating the White Slave Traffic Act of June 25, 1910 (36 Stat. 825, c. 395 [Comp. St. § 8812]). He complains of instructions of the trial court and the admission of certain evidence, and also says that the evidence which was competent was not sufficient to warrant the verdict. The arguments in the brief upon the several questions are so intermingled that for the better understanding of them the facts which we think were fully and competently proved will be set forth. No testimony was given, except by witnesses produced by the government.

[1] The accused first met the young woman in the case at Aberdeen, S. D. She had recently separated from her husband and was a waitress in a restaurant which the accused patronized. Shortly afterwards she went to Cleveland, Ohio, and he went to Sioux City, Iowa. Just before her departure, he entertained her at dinner at a hotel in Aberdeen. She was in Cleveland about two months, and while there received several letters purporting to have been written and signed by him, to all of which she responded. The letters were offered in evidence, but, upon objection by his counsel, the court excluded them, because it appeared that the accused could not read or write the English language. Nevertheless, while on the witness stand, she testified from time to time, and without objection, to what was necessarily the purport of their correspondence in part. While at Cleveland she received $15 from the accused, also a telegram. The fact that she received a telegram was shown, but the contents were excluded by the court. Being advised that a railroad ticket to Sioux City awaited her at the station in Cleveland, she went there and got it. Her information was that the ticket came from the accused. Shortly before this two men appeared at the window of the railroad ticket office in Sioux City, one of whom, not the accused, acted as spokesman for the other, and arranged and paid for the delivery of the ticket to her at Cleveland. He represented that she was the sister of the other man. The latter was seen indistinctly, and was not identified as the accused. The young woman left for Sioux City, using the ticket. She had never been in that city before, and had no relatives, friends, or acquaintances there, except the accused. The day before her arrival the accused told the proprietress of the lodging house where he roomed with another man that he expected his wife, and he arranged with her for a separate room. He met the young woman at the station when she arrived. They went to his lodging house. He introduced her to the proprietress as his wife. In his presence she registered the accused and herself as husband and wife. They repaired to the room previously assigned him, he took his belongings there, and they occupied it together for at least two nights. The furnishing of the room implied the most intimate relations. He

paid for her occupancy of the room, and also for her board at a restaurant. Later he attempted to kill her, because she desired to leave him and return to Cleveland. The disclosure of their relations resulted from the disturbance and the calling in of a police officer. To say that the above was insufficient to warrant the jury in finding that the accused caused the young woman to be transported on the interstate journey from Cleveland, Ohio, to Sioux City, Iowa, for an immoral purpose, is to take a sophistical view that is out of touch with the actualities of life. It is true that the young woman testified on cross-examination that she went to Sioux City of her own accord, and that accused did not induce or entice her; also that she denied an inference from their occupancy of the same room. But under the circumstances the significance of their undisputed conduct was for the jury, and it is idle to say the conclusion was unwarranted.

[2] When on the witness stand the young woman was asked by counsel for the government whether prior to her arrival in Sioux City she had any arrangement or understanding with the accused with reference to her meeting him there. The record shows an affirmative answer by her, and then an objection by counsel to the question. The complaint that the court overruled the objection might be disposed of by observing that the objection came too late and that there was no motion to strike out the answer. But, aside from that, no prejudice resulted, even if the contents of the letters were thus indirectly brought into the case. That a meeting was arranged and understood between them appeared otherwise without reasonable doubt. Furthermore, there was enough in the evidence to have justified the court in admitting the letters themselves, with an instruction that the jury should consider them only if they found that they were written at the direction of and for the accused. Illiteracy does not exclude other proof of responsible authorship. The complaint of the admission of testimony of the young woman that the arrangement with the accused was made about two weeks before she left Cleveland is equally without merit.

[3]] It is urged that the court erred in reciting the undisputed facts in its charge to the jury. The recital was substantially correct except in one particular. The court said that the ticket agent at Sioux City heard his assistant in the office inquire of the man at the window as to who was buying the ticket, and that the latter named the accused. This does not appear in the bill of exceptions. It may be that the court got the fact from the railroad office record of the transaction, which was received in evidence, but is not set forth in the record before us. However this may be, the court carefully told the jury that what it said about the evidence was simply according to its recollection and that they were not bound by it. There was in this no reversible error.

The sentence is affirmed.

(257 Fed. 416)

JUNG BACK SING et al. v. WHITE, Commissioner of Immigration.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919. Rehearing Denied June 6, 1919.)

No. 3258.

1. HABEAS CORPUS ⟹25(1)—CHINESE PERSONS—DEPORTATION—FAIR HEARING.

A Chinese person ordered deported is not entitled to discharge on habeas corpus, because she was denied the right of counsel at her preliminary hearing, where after examination a second warrant was issued, and she was notified in the presence of her counsel of a right to counsel, and at that time, without objection by counsel then representing her, the former examination was introduced in evidence as a part of the record in the proceedings under the second warrant.

2. HABEAS CORPUS ⟹25(1)—CHINESE PERSONS—DEPORTATION—EVIDENCE.

A Chinese person ordered deported by the immigration authorities was not denied a fair hearing, so as to be entitled to discharge on habeas corpus, because the immigration authorities admitted in evidence the testimony given by a witness in a case in the state court, without showing that the witness was not available in person, where counsel for such Chinese person merely requested that all of the evidence of the witness be introduced, and made no objection to the introduction of the whole record of the testimony in the case in the state court.

3. HABEAS CORPUS ⟹25(1)—CHINESE PERSONS—DEPORTATION—EVIDENCE.

A Chinese woman ordered deported was not denied a fair hearing, so as to be entitled to habeas corpus, because the immigration authorities refused to allow her alleged husband to testify in person, where the inspector requested an affidavit of the husband and considered the same.

4. ALIENS ⟹54—CHINESE PERSONS—DEPORTATION—EVIDENCE.

Evidence in deportation proceedings against a Chinese person *held* to warrant an order for her deportation, on the ground that she was found employed in or connected with a house of prostitution, or resort frequented by prostitutes, and that she had been sharing in or deriving benefits from the earnings of prostitutes.

Appeal from the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Application by Jung Back Sing and Dear Shee for a writ of habeas corpus against Edward White, as Commissioner of Immigration, Port of San Francisco. From a judgment denying the writ, relators appeal. Affirmed.

James M. Hanley and Herbert Chamberlain, both of San Francisco, Cal., for appellants.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and Ben F. Geis, Asst. U. S. Atty., of Willow, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. Dear Shee, a Chinese alien, was ordered deported upon a warrant which charged that she was found employed by, in, or in connection with a house of prostitution, or resort habitually frequented by prostitutes, or where prostitutes gathered, and that she had been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes. Jung Back Sing, claiming

to be her husband, but who was found by the immigration officials never to have been married to her, filed a petition in the court below for habeas corpus, alleging that the hearing on the proceedings for deportation was unfair. The record in those proceedings was submitted with the petition for the writ.

[1] It is contended that the proceedings were unfair in that, first, Dear Shee was denied the right of counsel at a preliminary examination on January 25 and 26, 1917, and was not instructed as to her right to be represented by counsel. It appears that after that examination of Dear Shee a second warrant was issued, and that she was notified in the presence of her counsel of her right to counsel, and that at that time, without objection from her counsel then representing her, the former examination was introduced in evidence as a part of the record in the proceedings under the second warrant. It is not ground for discharging an alien on habeas corpus that a preliminary examination was had without advising the alien of his right of representation by counsel (Mok Nuey Tau v. White, 244 Fed. 742, 137 C. C. A. 190), and, if there were error in the proceedings of January, it was cured by the admission of those proceedings in evidence without objection on April 18, 1917.

[2] It is said that Dear Shee was denied a fair hearing by the action of the immigration authorities on April 3, 1917, in admitting in evidence the testimony of Ay Ying given at a hearing in the case of Choy Sun in the superior court of San Francisco, without first showing that Ay Ying was not available in person, or without showing inability to procure her affidavit; also in introducing only a part of the record in the Choy Sun case, and without showing that a verdict was rendered therein finding Choy Sun not guilty. The answer to this is that the testimony of Ay Ying so taken in the superior court was introduced without objection from counsel for the appellants, and that he then asked that all the evidence of said Ay Ying be introduced and incorporated in the record.

But the appellants assert that, instead of introducing the testimony of Ay Ying alone, the whole record of the testimony in that case was taken and received in evidence. Again the answer is that counsel for the appellants made no objection to the reception of the record, and moreover it does not appear that any portion of the record other than Ay Ying's testimony was considered on the hearing or on the appeal. The Secretary of Labor, in affirming the order of deportation, said:

"In the transcript of proceedings in the superior court of San Francisco, pages 1 to 45, which were made a part of the hearing so far as the testimony of Ay Ying was concerned, Ay Ying testified," etc.

[3] It is said that the hearing was unfair, in that the alleged husband of Dear Shee was not allowed to testify. It appears that counsel for Dear Shee asked permission to have her husband testify in person, to which the inspector answered that he preferred an affidavit, and added, "If we want him, we will call for him." It does not appear that any substantial rights of the appellants were prejudiced by this action of the inspector. The alleged husband was allowed to, and did,

present in the form of affidavits the facts as to which he might have testified.

[4] It is urged that the record in the proceedings for deportation contains no evidence to sustain the particular charge under which Dear Shee was ordered deported, and that there is absolutely no evidence to show that she was employed or detained by any person in a house of prostitution, or resort frequented by prostitutes, or where prostitutes lived. The record contains ample evidence to sustain the charge that Dear Shee was a prostitute, and on that charge she might have been ordered deported. There is but little evidence to sustain the specific charge which was made against her. But we think there is sufficient in the affidavit of Donaldina Cameron, superintendent of the Presbyterian Chinese Mission, to sustain the specific charge which was made. That affidavit states:

> That the affiant had known Dear Shee "as a slave owner and prostitute for the past year"; that "on May 29, 1916, I raided the premises at 926 Stockton street under a juvenile court warrant, and took in custody Wong Hong Ho, and at that time Dear Shee, alias Kow Ling, was an inmate of those premises, and was left in charge of the house after the other women were taken to prison. On January 24, 1917, I raided the premises at 710 Sacramento street under juvenile court warrant, and took in custody Jung Ohy, and I again found Dear Shee, alias Kow Ling, in charge of the premises."

There was other evidence to corroborate that affidavit. If Dear Shee was a slave owner, and was in charge of a house of prostitution, we think it may properly be found that she was employed "in or in connection with a house of prostitution," and was "receiving, sharing in, or deriving benefit from the earnings of a prostitute" as charged in the warrant.

The judgment is affirmed.

(257 Fed. 418)

PRUDENTIAL CASUALTY CO. v. MILLER.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3103.

1. REFORMATION OF INSTRUMENTS ⟹30—BURGLARY POLICY—EQUITABLE CAUSE OF ACTION.

   If the agent of a burglary insurer and the insured storekeeper or his agent so misunderstood each other that their minds never met as regards the extent of the store's burglary alarm equipment, or if agent of insurer through mistake or designedly misinformed insurer as to extent of such equipment, or undertook without authority to waive failure of the storekeeper to connect his safe with a burglary alarm system, correction of the policy as issued cannot be obtained at law, but must be sought in equity, after which the actual contract as then determined can be enforced.

2. INSURANCE ⟹143(3)—BURGLARY INSURANCE—ACTION IN DISREGARD OF PROVISION.

   The holder of burglary insurance cannot accept his policy without reading it, and in an action at law on the instrument, after a loss, ignore one of its provisions and have it enforced otherwise than according to its terms; his remedy, if any, being by reformation in equity.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. ACTION ⟹68—STAY OF ACTION AT LAW PENDING SUIT IN EQUITY.
When it is discovered, after an action at law is brought on a policy of insurance, that a reformation is necessary, for which a bill in equity must be filed, the action at law will be held in abeyance until the case in equity is concluded.

In Error to the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Gilbert E. Miller against the Prudential Casualty Company. To review judgment for plaintiff, defendant brings error. Reversed.

Wilson W. Mills, of Detroit, Mich., for plaintiff in error.
James O. Murfin, of Detroit, Mich., for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SATER, District Judge.

SATER, District Judge. On October 2, 1915, Miller made a contract with a still alarm company for the equipment of the doors, windows, and transoms of (but not of the safe in) one of his Detroit jewelry stores with a burglar alarm system. He then held an unexpired policy issued by the insurance company, insuring him for $5,000 against loss by burglary. While the work of installation was in progress, Allen, who, notwithstanding his rather uncertain evidence as to his status with the insurance company, must be regarded as its accredited representative, met Guerin, who was Miller's financial man and business manager, at which time Guerin, so he states, exhibited to Allen the executed contract between Miller and the still alarm company. Allen claims he was shown merely an unsigned memorandum. The instrument produced was examined by Allen, and a discussion took place as to most of its details. Guerin took him over the premises, and explained to him quite fully of what the equipment would consist. The evidence is not entirely clear as to whether there was any mention of, or discussion between them relating to, the protection of the safe located in the rear of the store, but there is no pretense that Guerin represented that the still alarm system was to extend to the safe. Allen suggested, what was previously unknown to Miller and Guerin, that, on account of the improvement then being made, Miller would be entitled to a rebate on the premium previously paid for his insurance policy. He claims to have discussed the matter of the store's equipment several times from early September until some time in October, with both Miller and Guerin, and that on one occasion, when the latter was absent, he was informed by Miller that a complete system of protection including a wooden casing around the safe with connections with the outside central alarm system was intended. Miller did not testify, being "somewhere between Jacksonville and Washington" at the time of the trial.

The still alarm company completed its contract for work at the store about November 1, notice of which was given to Allen, who,

after that date on more occasions than one, visited the store, but at no time examined or noticed the safe. He had never seen a safe inclosed by a wooden casing. On December 27, Guerin received from the insurance company in Miller's mail a rider to be attached to the insurance policy, and also a check for the rebate (which had been figured by Allen) on the premium theretofore paid. The rebate was such as would be allowed for the protection of the safe, as well as the doors, windows, and transoms, and was greater than it would have been, had it been based on the installation actually made. The check was paid, and Miller received the money. Guerin, presumably without reading such rider, placed it in the file with the policy, and neither Miller nor any of his agents knew of any claim of failure in the installation of the still alarm system until after his safe was burglarized and more than $5,000 worth of property was abstracted therefrom on the night of February 5, 1916. The rider provides that, in consideration of the return of a portion of the premium, it is agreed that Miller had installed and that his safe was protected by a still alarm system, which was connected with a wooden casing surrounding the safe and connecting with the central alarm system; that he warrants the maintenance of such system from November 1, 1915; and that nothing contained in such rider, except as therein stated, should be held to vary or waive any of the terms of the policy. One of the terms of the policy is that no agent of the insurance company has authority to change it, or waive any of its provisions, nor shall any notice to or knowledge of any agent be held to effect a waiver or change in the insurance contract or any part of it. Proofs of loss were made by Miller on a blank form furnished by Allen, were verified before him, and were submitted to the insurance company, which refused payment and denied all liability because the safe was not protected by or connected with the still alarm system.

Miller sued on the policy as originally issued. The insurance company admits its execution and delivery, and defends, in so far as its defense is meritorious, on the ground of breach of warranty in failing to install and maintain a wooden casing about the safe, with still alarm connections. At the conclusion of all the testimony the defendant, alleging the evidence showed such breach of warranty, moved for a directed verdict. The motion was overruled, and an exception was reserved to the ruling. A verdict was returned for the full amount of Miller's claim, and, following an adverse ruling on the motion for a new trial, judgment was entered thereon. Under the court's very direct instructions as to what the jury must answer as to various points involved, should the verdict be for the plaintiff, the jury necessarily found that neither Miller nor any authorized agent of his knew that the rider provided for a wooden casing around the safe, or made any misrepresentations to or deceived the insurance company relative to the equipment to be supplied, or which had been supplied, for its protection, or in any manner concealed or failed to reveal the true situation regarding it, and that the insurance company had actual knowledge that a wooden casing around the safe had not been installed. The jury manifestly repudiated Allen's evidence, not only as to his con-

versation with Miller, but also in so far as it was contradictory of that given by Guerin.

[1-3] We need not determine whether the insurance company, prior to the issuance of the rider, was misinformed by Allen as to the extent of the alarm system installed, or as to whether he undertook to waive the nonconnection of the safe with such system, or as to whether the minds of the parties in interest ever met as to the purpose to protect and the actual protection of the safe. If Allen and Miller, or his agent, so misunderstood each other that their minds never met as regards the extent of the store's equipment, or if Allen through mistake or designedly misinformed the insurance company as to its extent, or if he undertook to waive the failure to connect the safe with a burglar alarm system, and thus exceeded his power, a situation was presented which a court of law could not correct. Correction, if desired, must be obtained in a court of equity, after which the actually existing contract between the parties as thus determined can be enforced. If the insured can prove that he made a different contract from that expressed in the writing, he can, on making sufficient proof, have it reformed in equity; but he cannot accept his policy without reading it, and in an action at law upon the instrument ignore one of its provisions and have it enforced otherwise than according to its terms. A jury may not thus reform a policy by striking out one of its clauses. Lumber Underwriters v. Rife, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. Ed. 1140; New York Life Ins. Co. v. McMaster, 87 Fed. 63, 30 C. C. A. 532 (C. C. A. 8); Chicago & A. Ry. Co. v. Green (C. C.) 114 Fed. 676, 678. It follows that the trial court erred in not sustaining the motion for a directed verdict. Miller, however, is not remediless; for when it is discovered after an action at law is brought on a policy of insurance that a reformation is necessary for which a bill in equity must be filed, the action at law will be held in abeyance until the case in equity is concluded. Abraham v. North German Fire Ins. Co. (C. C.) 37 Fed. 731, 3 L. R. A. 188; Simkins, Fed. Eq. Suit, 509.

Other questions discussed need not be considered. The judgment of the trial court is reversed.

(257 Fed. 421)

STARK BROS.' NURSERIES & ORCHARDS CO. v. LITTLE et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2607.

1. CORPORATIONS ⟹640—FOREIGN CORPORATIONS—FILING OF REPORTS—STATUTE—APPLICATION.

Rev. Codes Mont. § 3850, relating to the filing of reports and affidavits by corporations, was not intended to, and does not, apply to foreign corporations.

2. CORPORATIONS ⟹640—FILING OF REPORTS—FOREIGN CORPORATIONS—"DEBT OR JUDGMENT."

If Rev. Codes Mont. § 3850, making directors of corporations liable for debts if they do not file certain reports, applied to foreign corporations, the "debt or judgment" specified therein must be limited to a debt incur-

red in Montana or a judgment based thereon: a state being without power to make nonresident directors of a corporation of another state liable upon a debt incurred in still another state to another foreign corporation.

3. PLEADING ⟹34(3)—PRESUMPTIONS IN AID OF—FILING OF REPORTS—LIABILITY OF DIRECTORS OF CORPORATIONS.

Assuming that Rev. Codes Mont. § 3850, making directors of a corporation liable for debts of the corporation if they do not file certain reports, applies to foreign corporations, in a proceeding against directors of a foreign corporation for not filing such reports in Montana, it must be specifically alleged that the debt was incurred in Montana, inasmuch as a judgment rendered in Montana on a debt raises no presumption that the debt was there incurred.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the Stark Bros.' Nurseries & Orchards Company against Charles B. Little and W. D. Starnes. There was judgment for defendants, and plaintiff brings error. Affirmed.

Ben M. Smith, of Chicago, Ill., for plaintiff in error.

L. A. Stebbins, of Chicago, Ill., for defendants in error.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. Pursuant to the provisions of section 3850 of the Revised Code of Montana, the material portions of which are copied in the margin,[1] action was brought by plaintiff corporation against the directors of a South Dakota corporation doing business in Montana, to subject them to a Montana judgment recovered by plaintiff against the corporation. To the declaration, which alleged the failure of the corporation to file the required report within the statutory period and of defendants to file the required affidavit, a demurrer was sustained.

[1] 1. Under the decisions of Helena Power-Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567, 10 Ann. Cas. 1055, and Daily v. Marshall, 47 Mont. 377, 133 Pac. 681, and

[1] "Sec. 3850. Every corporation, having a capital stock, except banks, trust companies and building and loan associations, shall annually, within twenty days from and after the thirty-first day of December, file, in the office of the clerk of the county in which the principal place of business of such corporation is situated, a report which shall state the amount of the capital stock, the proportion thereof actually paid in and the amount thereof actually paid in cash and the amount issued, if any, in payment of property purchased and the amount of existing debts and also the names and addresses of the directors or trustees and of the president, vice-president, general manager and secretary of the corporation. Such report shall be signed by the president and a majority of directors. * * * If any such corporation shall fail to file such report, directors of the corporation shall be, jointly and severally, liable for all debts or judgments of the corporation then existing, or which may thereafter be in any wise incurred until such report shall be made and filed; provided, however, that if within ten days after such failure a director, or directors, shall make and file, as aforesaid, an affidavit or affidavits, stating that the failure was due to no fault or neglect of his or theirs, and stating, also, that, within the said twenty days he or they requested the president or sufficient number of the other directors, whose residence was known to the affiants, to join them in making report, such director, or directors, shall not be liable under this section. * * *"

notwithstanding Nelson v. Bank, 157 Fed. 161, 84 C. C. A. 609, 13 Ann. Cas. 811, we are satisfied that this statute was not intended to and does not apply to foreign corporations.

[2, 3] 2. At the oral argument, counsel properly conceded that, if the statute applied to foreign corporations, "the debt or judgment" specified in the statute must be limited to a debt incurred in Montana or a judgment based thereon; otherwise, the act would be clearly unconstitutional, as Montana is without power to make Illinois directors of a South Dakota corporation liable upon a debt incurred in Missouri to a Missouri corporation. That the judgment was rendered in Montana raises no presumption that the debt was there incurred. Proof of this fact would be essential; the fact itself must therefore be alleged in the declaration. Bartlett v. Crozier, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428.

Judgment affirmed.

(257 Fed. 423)

T. L. SMITH CO. et al. v. CEMENT TILE MACHINERY CO.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1919. Rehearing Denied June 2, 1919.)

No. 5153.

1. PATENTS ⟹327—VALIDITY AND SCOPE—EFFECT OF PRIOR DECISIONS.
   The sustaining of a patent upon a differentiation from the prior art does not authorize the successful party to gather to himself a monopoly of what was old when he entered the field.
2. PATENTS ⟹328—INFRINGEMENT—MIXING MACHINE.
   The Smith patent, No. 803,721, for improvements in concrete mixers, construed, and *held* not infringed.

Appeal from the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Suit in equity by the T. L. Smith Company and others against the Cement Tile Machinery Company. From the decree, complainants appeal. Affirmed.

For opinion below, see 249 Fed. 481.

George L. Wilkinson, of Chicago, Ill. (Alfred Longley, of Waterloo, Iowa, on the brief), for appellants.

John E. Stryker, of St. Paul, Minn., for appellee.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

HOOK, Circuit Judge. This is a suit by the T. L. Smith Company and others for infringement of certain claims of patent No. 803,721, issued to that company as assignee November 7, 1905, for an improvement in mixing machines especially adapted for mixing concrete, etc. A prior suit in the Seventh Circuit by the same plaintiffs against one Foster was defended by the present defendant, the Cement Tile Machinery Company, as the maker and vendor of the machine claimed to infringe. It was held in that case that the Smith patent was not anticipated by prior patents, among which were a British patent, No. 441, to

Day and Lampard, August 2, 1878, and patent No. 433,663 to Taylor, August 5, 1890; also that the Smith patent, which was for a combination of old elements, disclosed invention, and that the machine used by Foster infringed. The decree was affirmed by the Circuit Court of Appeals of that circuit. Foster v. T. L. Smith Co., 157 C. C. A. 296, 244 Fed. 946. The present defendant made a change in its machine, which it contends was not involved in or affected by the decision in the Foster Case, but followed the prior patent to Taylor in the particulars in question. This suit was then brought, first, to enforce against the defendant the decree against Foster; and, second, for a decree that the modified structure of defendant also infringed. The trial court gave the first relief and denied the second. 249 Fed. 481. The plaintiffs appealed from the latter.

[1] The decree in the first suit is conclusive against the defendant as to the validity of the Smith patent and infringement by the machine it made and sold to Foster. Defendant's modified structure, however, was not in issue in that case, and was not considered by the court, and the question here is whether, in the light of the former decision, it infringes also. If the change from the Foster machine is a substantial departure from a vital element or elements of the patent in suit, or a reversion to the prior art, it cannot be said that plaintiffs' rights are invaded. The sustaining of a patent upon a differentiation from the prior art does not authorize the successful party to gather to himself a monopoly of what was old when he entered the field. The prior Taylor patent has expired. Its disclosures are public property, and no range of equivalents can be accorded the Smith patent that would embrace them.

[2] Roughly speaking, a mixing machine comprises a bowl or receptacle for the materials to be mixed, attached to a tiltable frame, which in turn is supported by and moves within a fixed, stable frame or yoke. As its name implies, the interior frame may be tilted, and thereby the mouth or opening of the receptacle which it carries may be put in position on one side or the other of the fixed support for loading or discharging the materials. The receptacle itself may be continuously rotated or revolved for the mixing operation, regardless of the position of the tilting frame. It was stated in the Smith patent that the primary object of the invention was to provide means for tilting the mixing receptacle, and further to provide a simple form of gearing for rotating the receptacle itself. The claims involved in this suit and also in the prior suit are Nos. 16, 17, 18, 28, 30, 31, and 32. An element in each of the first three claims is stated as being means for tilting the frame to any position in the entire circle of its revolution. In the others it is expressed more restrictively as "means for tilting said frame either to the right or to the left of the loading point." In a sense, plaintiffs' structure may be said to be ambidextrous. When the materials have been loaded into the receptacle and mixed by its rotation, they may be discharged on either side of the machine, as may be convenient for the work in hand. The other important feature of the claims in suit is the gear on the receptacle and the means of applying power for rotation, whatever may be the position of the tilting

frame and the receptacle. The Court of Appeals of the Seventh Circuit very properly held that the means specified for tilting the tilting frame and for rotating the receptacle were essential elements of the Smith combination, that the prior Taylor structure was lacking in those respects, and therefore there was no anticipation from that direction.

The defendant's modified structure is equally deficient in the two features mentioned by which Smith's was distinguished from Taylor's. Its tilting frame carrying the receptacle cannot move in an entire circle of revolution, nor in an arc sufficient for the discharge of the materials from the receptacle on either side of the loading point. The discharge can be on but one side. This is not, as in the machine sold to Foster and involved in the former suit, due to a fashionable form of the receptacle, limiting its motion, and which could be abandoned at pleasure, but to the essential character of the mechanical means employed by defendant for its rotation. In plaintiffs' structure a toothed rack around the middle of the receptacle is engaged by a driving pinion on the end of a shaft passing through a hollow trunnion. This simple and direct means for rotating the receptacle does not restrain the revolution or movement of the tilting frame. But defendant employs a train of gears, which with the frames blocks and limits the movement that constitutes the distinguishing feature of plaintiffs' structure. All of the elements in plaintiffs' patent appeared in the patents to Day and Lampard and to Taylor, but the combination of them was held in the former case to be new, and to produce a new or better result. But defendant does not secure that result, nor does he employ the particular means specified by plaintiffs, or other means within the comparatively narrow range of equivalents to which plaintiffs are entitled.

The decree is affirmed.

(257 Fed. 425)

KELLOGG SWITCHBOARD & SUPPLY CO. v. DEAN ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3011.

1. PATENTS ⟹328—HARMONIC CALLING MEANS IN TELEPHONE SYSTEMS—INFRINGEMENT.

The Dean patent, No. 779.533, for improvements in harmonic calling means for use in party line telephone systems, *held* not infringed.

2. PATENTS ⟹149—CLAIMS TOO BROAD—RELIEF ON FILING DISCLAIMER.

The owner of a patent, if it be held in his suit for infringement that the claims in suit are too broad, cannot be given relief on filing necessary disclaimer in the Patent Office, where, if limited to the application of the three first features in the patent relied upon by plaintiff, another feature not employed by defendant's device would still remain, while, if made to include a construction of the claims in accordance with plaintiff's interpretation of the distinguishing fourth feature, relief would be inequitable as converting into infringement acts otherwise innocent.

Appeal from the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit in equity by the Kellogg Switchboard & Supply Company against the Dean Electric Company. From a decree for defendant (231 Fed. 197), plaintiff appeals. Affirmed.

W. Clyde Jones, of Chicago, Ill., for appellant.

F. O. Richey, of Elyria, Ohio, and Charles A. Brown, of Chicago, Ill., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Suit for infringement of patent No. 779,533, January 10, 1905, to Dean, for improvements in harmonic selective calling means for use in party line telephone systems.

[1] In the calling device of the patent there is located between extensions of the ends of an electro-magnet (whose rear end is adjacent to one end of a permanent magnet) an armatured bell reed, whose rear end is held adjacent to the other end of the permanent magnet, whereby the bell is "polarized," the reed being held at rest in neutral position until an alternating current, selected at the central station, and of a frequency harmonizing with the rate of vibration of the subscriber's bell-reed, is impressed on the electro-magnet, whereupon the reed is made to vibrate alternately in opposite directions between the pole pieces of the electro-magnet, causing the hammer on the outer end of the reed to strike the gong; the other bells on the party line [none of which are in harmony with the selected rate of current frequency] being unaffected. In practice, four different rates of current frequency are used, viz. 16⅔, 33⅓, 50 and 66⅔, per second.

Judge (now Mr. Justice) Clarke, who presided below, dismissed the bill for laches in prosecution and for lack of infringement. In reaching the conclusion of noninfringement, Judge Clarke found that there was nothing new in the idea of Dean's harmonic selective signaling system; that all the elements of the combinations of the various claims in suit had been before used in the same combination, to produce the same result (though perhaps not so successfully as the plaintiff accomplished it); that the patent, if valid, should not be given a scope beyond the letter of the claims in suit, which, as held by the court, do not call for any special construction of reed tongue or polarized bell, each, however, containing as a supposed element of novelty, a so-called "undertune" feature, whereby the reeds are so adjusted as to be operated by a current of alternating frequency, corresponding, not to the natural rate of vibration (or pitch) of the reed, but to its rate as accelerated by the reflex action of the gong when struck; and that defendant does not employ the "undertune" feature—the operative rate of actuation of its bell being the natural rate of vibration of the reed tongue, unmodified by the action of the gong. 231 Fed. 197.

The features of novelty and invention which plaintiff contends are found in the elements of the combinations of the various claims in suit (Nos. 1, 3, 5, 17, 18 and 19) are (1) a reed tongue vibrating as a whole and not in nodes; (2) a hammer resiliently mounted, capable of a certain limited freedom of movement with respect to the reed tongue; (3) the latter being positively actuated by the electro-magnet in both

directions, to secure vibrations in practical synchronism with the ringing current; and (4) the latter having a rate of frequency sufficiently close to the natural rate of vibration of the reed to start the bell ringing, and sufficiently close to the accelerated rate occasioned by the kick-back of the gong to keep the bell operating—this flexibility of the impressed current rate being styled the "operative range." Plaintiff specifically rejects the "undertune" theory.

Passing the question of laches in prosecution (especially in view of the stipulation of counsel dropping the case from the trial calendar subject to reinstatement), we agree entirely with Judge Clarke's conclusion of noninfringement. There was nothing new in the idea of a harmonic, selective, alternating calling system, nor in the use of the polarized bell in connection therewith, whereby the bell reed was positivey actuated by the electro-magnet in both directions, and for the purpose claimed by plaintiff for its reed. Although such bells of the prior art did not prove satisfactory, and were discontinued after several years commercial use, they do not impress us as merely abandoned experiments. In the case of one or more of them the rigidity of the reed tongue perhaps contributed largely to lack of success. But the court below rightly found that the claims in suit did not call for any special construction of reed tongue or of polarized bell; for, while the specification describes a construction of the reed apparently capable of producing, and intended to produce, the results plaintiff claims for it, the claims call for the reed tongue only as "tuned," which has no relation to form. That the claims were not intended to cover the form of the reeds is further shown by the inclusion in a patent to Dean, applied for contemporaneously with the application for the patent in suit (and issued later), of several claims upon the specific form of a reed, corresponding to that described in the patent before us, and intended to accomplish the results plaintiff claims for that reed. Not only do none of the claims in suit call for a "polarized bell," except in that language alone, but the specification describes the bells as "polarized by permanent magnets, as in an ordinary alternating current bell." There is thus no room for the application of the rule that reference may be made to the specification to ascertain the characterizing features of an element described in the claims only generally and indefinitely.

We also agree with Judge Clarke that a characteristic element of each of the claims in suit is the "undertune" feature. Their language is:

"Means at the central office for impressing upon the line ringing current of frequencies *corresponding* to such operative rates of the bells and *sufficiently close to* the natural rates of the tongues to start the same vibrating." Some of the claims add, "from a state of rest."

The specification, after stating that the ringing current rates applied have "frequencies corresponding to the operative rates of vibration of the reed tongues," describes those operative rates as "the resultant of the natural pitch of the reed, as modified by the weight of the hammer or ball, the armature, and the action of the bell gong when it is struck," and as higher than the natural rate. The fact that the cur-

rent frequencies need only be "sufficiently close" to the *operative* rate of reed vibration "to successfully operate the bells," and "sufficiently close to" their *natural* vibration "to start them vibrating when current is first impressed upon the line," does not overcome the otherwise plain requirement that the current frequency rate must be substantially higher than the natural pitch of the reed, and must correspond with its operative rate of vibration—making due allowance for "operative range."

All doubt on the subject is removed by the oral testimony of the expert who assisted Dean in working out the application for the patent in suit, to the effect that it was then recognized that the only novel element of the claims was the "undertune" feature, although this feature is said to have turned out not to be novel in fact. The device of the patent in suit is doubtless superior to any prior selective, harmonic system; but the patent is not of a primary character, nor is its permissible range of equivalents broad enough to include defendant's structure.

It is persuasively shown that defendant's system, which is operated under a later patent to Dean, does not use the "untertuned" reed of the patent in suit, in which the impressed current corresponds not to the natural pitch of the reed, but to its rate as increased by the action of the gong, but uses an "in-tuned" reed—that is to say, one designed to vibrate at its natural rate, and thus most efficiently, under a current frequency corresponding to that natural rate, such rate not being accelerated by striking the gong. That its bell, like plaintiff's will actually operate under a current ranging from a few cycles below to a few cycles above the selected and most efficient current rate does not make to the contrary.

We do not understand the proof to show that defendant has constructed or sold bells which depend for their successful operation upon the use of an "undertuned" reed. We are content to rest our affirmance of the decree upon the opinion of Judge Clarke, supplemented by what we have said.

[2] Plaintiff, however, asks here that, if it be held that the claims in suit are too broad, it be given relief on filing necessary disclaimer in the Patent Office. We cannot accede to this request. If limited in application to the first three features before enumerated as relied upon by plaintiff, the undertune feature would still remain. If made to include a construction of the claims in accordance with plaintiff's interpretation of the distinguishing fourth feature (the "operative range" theory), such relief would be inequitable, as converting into an infringement acts otherwise innocent, because based upon a natural and correct interpretation of the claims as written, especially in view of the proof that the patentee intended them to be so interpreted. This would be to broaden, not to narrow, the claim.

The decree of the District Court is affirmed.

(257 Fed. 519)

THORN et al. v. BROWNE.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1919.)

No. 5083.

1. FRAUDS, STATUTE OF ⟹115(3)—CONTRACTS—SIGNATURE—COTTON FUTURES ACT.

Under Cotton Futures Act Aug. 11, 1916, § 4 (Comp. St. § 6309d), providing that "each contract of sale of cotton for future delivery * * * shall be in writing plainly stating, or evidenced by written memorandum showing, the terms of such contract, * * * and shall be signed by the party to be charged, or by his agent in his behalf," a broker's seller's slip or buyer's slip, duly signed "by the party to be charged" in accordance with the rules of the exchange, is sufficient to prove a valid sale or purchase, and it is not essential that the contract be signed by both parties, or that both the seller's and buyer's slips shall be introduced in evidence.

2. STATUTES ⟹188, 225¾—CONSTRUCTION—USE OF WORDS OR PHRASES WITH ESTABLISHED MEANING.

When a legislative body selects and uses in a statute words or clauses which had previously acquired by judicial interpretation or common consent and use a well-understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute.

3. STATUTES ⟹241(1)—CONSTRUCTION—PENAL STATUTES.

Courts may not lawfully extend the denunciation of a penal statute to a class of persons excluded from its effect by its plain terms.

4. EVIDENCE ⟹69—PRESUMPTIONS—REGULARITY OF COURSE OF BUSINESS.

Under a rule of a cotton exchange requiring a seller to deliver to the buyer a signed seller's slip and to furnish a corresponding buyer's slip, which shall be signed and returned by the buyer, the introduction in evidence of one of such slips raises a legal presumption that the corresponding slip in the same terms was also executed.

5. FRAUDS, STATUTE OF ⟹116(9)—COTTON FUTURES—CONTRACT DISCLOSING PRINCIPAL'S NAME.

Where contracts for purchase and sale of cotton futures are made between brokers on an exchange, where brokers only can make such contracts, Cotton Futures Act Aug. 11, 1916, § 4 (Comp. St. § 6309d), does not require that the contracts should show the names of the principals for whom they act.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

6. BROKERS ⟹85(1)—ACTION AGAINST PRINCIPAL—EVIDENCE.
Evidence of purchases and sales of cotton futures, including the seller's and buyer's slips, *held* competent in an action by the brokers against their principal to recover a balance due on the transactions.

7. JURY ⟹37—IMPAIRMENT OF RIGHT—REVIEW—ISSUES DETERMINABLE ONLY BY JURY.
Where, because of the erroneous exclusion of evidence offered by plaintiffs to prove the contract sued on, which rendered recovery impossible, they introduced no evidence on a second issue of fact, upon which they had a constitutional right to a jury trial, such issue cannot be determined by the appellate court to sustain a judgment for defendant entered upon a directed verdict.

8. APPEAL AND ERROR ⟹856(3)—DETERMINATION OF CAUSE—ERROR AS TO GROUNDS OF DECISION—DIRECTED VERDICT.
Where a verdict is directed on limited, but untenable, grounds, it may not be sustained on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated, if they had been called to the attention of the defeated party, and he had been given an opportunity to meet them by evidence and argument.

Carland, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Action at law by Charles B. Thorn and another, copartners as Thorn & Maginnis, against Fred Browne. Judgment for defendant, and plaintiffs bring error. Reversed.

Certiorari denied 250 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

Ira D. Oglesby, of Ft. Smith, Ark., and Joseph E. Johnson, of Atlanta, Ga. (Oglesby, Cravens & Oglesby, of Ft. Smith, Ark., on the brief), for plaintiffs in error.

James B. McDonough, of Ft. Smith, Ark., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

SANBORN, Circuit Judge. The plaintiffs, Thorn & Maginnis, a partnership, were cotton brokers and members of the New Orleans Cotton Exchange, and the defendant Browne was a resident of Sebastian county, Ark. They sued him for the balance of an account of $23,215, which they alleged he owed them on the purchase and sale of 2,000 bales of cotton, and for commissions on such purchases and sales, which they bought and sold for him on his telegraphic orders between January 24 and February 2, 1917, subject to section 5 of the United States Cotton Futures Act (Act Aug. 11, 1916, c. 313, 39 Stat. 476 [Comp. St. § 6309e]) and the by-laws, rules, and conditions of the New Orleans Cotton Exchange. By his answer the defendant denied every allegation of the plaintiffs' complaint, except an averment therein that the plaintiffs had in their possession $6,760 of his money on February 1, 1917. He alleged that any contracts of purchase or sale the plaintiffs made on his orders were illegal and criminal under the Cotton Futures Act, that the alleged transactions were gaming transactions, and that he was entitled to recover of the plaintiffs $6,760, for which he pleaded a counterclaim in his answer.

The trial proceeded in this way: Over the objections of the defend-

ant that the testimony was incompetent, irrelevant, and immaterial, and that the only competent evidence of the purchases and sales were the alleged written contracts required by the Cotton Futures Act, and with leave to the defendant to move to strike out the evidence, the plaintiffs proved, by telegraphic orders that they received from Browne, that he ordered them to buy and sell the 2,000 bales of cotton to be delivered in the following May, and they proved by the testimony of witnesses who knew the facts that they did buy and sell these 2,000 bales of cotton for Browne in accordance with the telegraphic orders he had sent them, that by contracts, settlements, and ring settlements they paid for the cotton which they bought for Browne the amounts charged to him in their account with him, and credited him with the amounts they received from him and from the sale of cotton, all of which he ordered them to sell on February 1, 1917. They proved by the testimony of one of the members of their firm that they sent to Browne a statement of the account between them, showing the amounts of their purchases and sales for him, and the balance for which they sued, that after he received this account he admitted to one of the members of the plaintiffs' firm that he sent the telegraphic orders, and that the account was correct. When the trial had reached this point, the plaintiffs produced, identified, and offered in evidence the sellers' slips or contracts of sale of the 2,000 bales of cotton which they bought for Browne, which slips were signed by the respective brokers who sold these 2,000 bales of cotton to them, and they also offered in evidence the buyers' slip of the 2,000 bales which they sold for Browne, which was signed by the brokers who bought them, and they offered to prove by the testimony of witnesses that they signed and delivered to each of the parties from whom they received one of the sellers' slips a buyers' slip containing the same words as the corresponding sellers' slip, except that the word "bought" in the former was in place of the word "sold" in the latter, and the bought slips were signed by them and ran in favor of the brokers who sold the cotton, and that they delivered to the brokers who gave them the bought slip a corresponding sellers' slip mutatis mutandis which was signed by them. To the introduction of these sellers' slips and of the bought slip signed by the parties respectively to be charged by the plaintiffs and their principal, Browne, defendant objected on the ground that they were invalid and were incompetent evidence, because they were not signed by both parties to the transactions out of which they arose, and because the corresponding buyers' slips and sellers' slips signed by the plaintiffs were not offered in evidence, and they objected to the parol evidence offered to the effect that the latter were delivered to the sellers and purchaser respectively by the plaintiffs when the respective transactions were made, on the ground that it was incompetent, because the written slips signed by both parties to the transaction were the only competent evidence of the transactions of purchase and of sale, and the court sustained all these objections, ruled out these slips, held that the contracts required by the Cotton Futures Act could not be proved without the introduction of the sellers' slips and the buyers' slips relating to each transaction, ruled out all evidence subsequently offered, and on motion struck out all evidence

previously offered, on the ground that it was all irrelevant and immaterial, in the absence of the buyers' and sellers' slips of each transaction, and then, as no evidence remained in the case, instructed the jury to return a verdict for the defendant, before the latter offered any evidence.

[1] Although many minor questions are suggested, the ruling which threw this case was that a broker's sellers' slip or buyers' slip, duly signed, was insufficient to prove a valid contract of sale or purchase of cotton futures under sections 4 and 5 of the Cotton Futures Act, unless that contract was signed by both the parties to the transaction, or the corresponding buyers' or sellers' slip was also introduced in evidence. The portion of the statutes by which this issue must be determined is the first sentence of section 4 of the act, which reads in this way:

"That each contract of sale of cotton for future delivery mentioned in section 3 of this act shall be in writing plainly stating, or evidenced by written memorandum showing, the terms of such contract, including the quantity of the cotton involved and the names and addresses of the seller and buyer in such contract, and shall be signed by the party to be charged, or by his agent in his behalf." Comp. St. § 6309d.

It is provided by rule 47 of the New Orleans Cotton Exchange that:

"It shall be the duty of the seller, on the day on which transactions in contracts take place, or at not later than 9 a. m. on the following day, to furnish a contract or slip, and deliver his own already signed, and the opposite one in blank to the buyer; the latter shall then sign his contract, or slip, and return it to the seller."

Testimony was offered that this rule was complied with in the case of each of the purchases made by the plaintiffs for Browne and in the case of the sale they made for him. Here are copies of two of the sellers' slips offered in evidence at the trial below:

"New Orleans, La., Jan. 25, 1917.

"Sold to Thorn & Maginnis, of New Orleans, La., and agreed to deliver them subject to the by-laws, rules and conditions of the New Orleans Cotton Exchange and subject to the United States Cotton Futures Act, § 5:

Bales Cotton.	Delivery.	At Cents Per Pound for Middling.
Three Hundred	May	16.84

"Silvan Newburger & Co.

"Silvan Newburger & Co. of New Orleans, La."

"New Orleans, La., Jan. 25, 1917.

"C. P. Ellis & Co., Cotton Exchange Bldg., sold to Thorn & Maginnis, of New Orleans, La., and agreed to deliver them subject to the by-laws, rules and conditions of the New Orleans Cotton Exchange and subject to the United States Cotton Futures Act, § 5:

Bales Cotton.	Delivery.	At Cents Per Pound for Middling.
One hundred	May	16.70
Three "	"	16.83
Two "	"	16.83
One "	"	16.90
Two "	"	16.81
One "	"	16.84

"C. P. Ellis & Co., of New Orleans, La."

Is a writing or written memorandum signed by both the parties to a contract of sale of cotton futures, or two writings or written memoranda of the contract, one signed by each of the parties to the transaction, indispensable to the proof of a writing or written memorandum "signed by the party to be charged or by his agent in his behalf," under section 4 of the Cotton Futures Act?

It is a general rule of law that a written contract signed by both parties to it is valid, and that a written contract between two parties signed by one of them is likewise valid and enforceable against him who signed it by the other party to it, who accepts and seeks to enforce it, although he has never signed it. If Congress had intended to require every transaction in the sale of cotton futures to be evidenced by a writing or by written memoranda signed by both parties to it, it would naturally have required the writing of which it treats to be signed by the parties to it or their agents in their behalf, and not "by the party to be charged or by his agent in his behalf" only. This provision of the statute states clearly and without ambiguity that the contract must be signed by the party to be charged or his agent in his behalf. The selection of one party is the exclusion of the other, and the strong legal presumption is that the Congress intended what it so plainly declared, that the statute ought to be held to mean what it expresses, and that the signature of no one but the party to be charged is requisite to it to evidence a valid contract. Brun et al. v. Mann, 151 Fed. 145, 157, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; Grainger & Co. v. Riley, 201 Fed. 901, 904, 120 C. C. A. 415, 418; United States v. Alamogordo Lumber Co., 202 Fed. 700, 706, 121 C. C. A. 162, 168.

[2] When a legislative body selects and uses in a statute words or clauses which before the enactment of the law had acquired by judicial interpretation or common consent and use a well-understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute it enacts. Butler v. United States (D. C.) 87 Fed. 655, 661; United States v. Trans-Missouri Freight Association, 58 Fed. 67, 7 C. C. A. 15, 71, 24 L. R. A. 73. For many years before the Cotton Futures Act was passed, the statutes of fraud of England and of many of the states of this nation had provided that certain classes of contracts specified therein should be void unless they were evidenced by a writing or by a written memorandum "signed by the party to be charged or his agent," and long before the passage of the act under consideration it had become the universal and well-understood judicial construction of these statutes that the signature of the party to be charged alone was sufficient to evidence a valid contract thereunder, and that the other party to the contract, although he had not signed it, could enforce it in the courts against him who had signed it. Browne on Statute of Frauds (1895) § 395; Wood on Statute of Frauds (1884) p. 764; 20 Cyc. 272, and note 78; Walker v. Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. and note at pages 681, 694, 696, 49 Am. St. Rep. 222; 23 Cent. Digest, 2286, §§ 244, 245; 9 Decennial Digest 1906, p. 1422, § 115 (3) and § 115 (4); Lee v. Vaughan's Seed Store, 101 Ark. 68, 73, 141 S. W. 496, 37 L. R. A. (N. S.) 352; Vance v. Newman, 72

Ark. 359, 80 S. W. 574, 105 Am. St. Rep. 42; In re Pettingill & Co. (D. C.) 137 Fed. 143; Bowers v. Whitney, 88 Minn. 168, 92 N. W. 540; Bristol v. Mente, 79 App. Div. 67, 80 N. Y. Supp. 52, and 178 N. Y. 599, 70 N. E. 1096; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576; Harriman v. Tyndale, 184 Mass. 534, 69 N. E. 353; Borie v. Satterthwaite, 180 Pa. 542, 37 Atl. 102, 103.

Congress took this well-adjudicated clause, "signed by the party to be charged or by his agent," and inserted it in the Cotton Futures Act in the form "signed by the party to be charged, or by his agent in his behalf," and it is incredible that it intended thereby that this clause should have a meaning so radically different from that which it then had as to require the writing or memorandum to be signed by others than that one of the parties so clearly designated by the law.

[3] And when the fact is considered that, if this section 4 be construed to mean that the writing or memorandum must be signed by both parties to the contract, one who makes or takes a contract of sale of cotton futures signed by the party to be charged only becomes guilty of the penal offense denounced by section 14 of the Cotton Futures Act (Comp. St. § 6309*o*), there remains no doubt that the meaning of the clause under consideration may not lawfully be extended by construction, so as to require every writing or written memorandum of a contract for the sale of cotton futures to be signed by both parties to it. For courts may not lawfully extend the denunciation of a penal statute to a class of persons excluded from its effect by its plain terms, even though in their opinion the acts of the latter are as heinous as those of the members of the class whose deeds the statute penalizes. United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. Ed. 37; United States v. Brewer, 139 U. S. 278, 280, 11 Sup. Ct. 538, 35 L. Ed. 190; United States v. Field, 137 Fed. 6, 8, 69 C. C. A. 568, 570; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 12, 2 L. R. A. (N. S.) 185. The conclusion is that the sellers' slips and the buyers' slips signed by the parties respectively to be charged by the plaintiffs and their principal, Browne, did not fail to comply with the Cotton Futures Act, and were not inadmissible evidence of the contracts of sale because they were not also signed by the plaintiffs, or because the corresponding buyers' slips and sellers' slips signed by the plaintiffs were not also offered in evidence.

[4] There is another reason why the sellers' slips and the buyers' slip signed by the respective parties to be charged were admissible in evidence and would have proved the purchases and sale in the absence of countervailing evidence, even if the Cotton Futures Act had required the execution of a buyers' slip and a sellers' slip for each transaction, as does rule 47 of the Cotton Exchange, and that is that the introduction of one of these corresponding slips under such a requirement raises the legal presumption that the corresponding slip in the same terms mutatis mutandis was also executed and delivered, a presumption which ought to and will prevail in the absence of proof to the contrary. Hawes v. Forster, 1 Moody & Robinson, 368, 371, 374; Parton v. Crofts, 16 C. B. Reports (N. S.) 11, 13, 14, 21; Benjamin on Sales (5th Ed.) 289, 297, 303. And inasmuch as, when one of these

slips is offered in evidence, the legal presumption is that the corresponding slip expressed the same terms of sale as those specified in the slip offered (see authorities, supra), and the plaintiffs were competent witnesses to prove the fact that they signed slips corresponding to those offered in evidence and delivered them to the other parties to the respective contracts at the times of the respective transactions, it was error to exclude their testimony to that effect.

[5, 6] Counsel for the defendant urges other, but less serious, objections to the slips which were offered in evidence. He contends that they are insufficient under the Cotton Futures Act: (1) Because, while they specified May delivery, they do not specify the year of the delivery, but they are dated in January and February, 1917, and there can be no doubt that the year of the delivery intended by the parties was 1917. (2) Because the names and addresses of the buyers and sellers are not set forth in the slips, but the buyers and sellers in the contracts under consideration were the New Orleans brokers, whose names and addresses appear on the slips. None but members of the Cotton Exchange could buy or sell cotton futures thereon. The statement of their names and addresses was no less a compliance with the statutes because they bought or sold for undisclosed principals, and the statute nowhere requires the disclosure in the contracts of the names or addresses not disclosed to opposing parties of the principals or others for whom the brokers make contracts the burden of which they personally assume. (3) Because under article 5, page 10, Treasury Regulations No. 36, which provides that no contract shall be deemed to comply with section 5, section 6a, or section 10 of the United States Cotton Futures Act (Comp. St. §§ 6309e, 6309g, 6309k), if it contain any provision by reference or otherwise inconsistent or in conflict with any requirement of section 5, section 6a, or section 10 of the Cotton Futures Act. These slips contain agreements of sale, purchase, and delivery of cotton futures "subject to the by-laws, rules and conditions of the New Orleans Cotton Exchange, and subject to the United States Cotton Futures Act," and section 3, rule 1 (15), of the Cotton Exchange provides in effect that verbal contracts "shall have the same standing, force and effect as written ones (if notice in writing conforming to the requirements of section 4 of the United States Cotton Futures Act), if such contract shall have been given by one of the parties thereto to the other party during the day on which such contract was made or the next business day thereafter." But a verbal contract may lawfully precede a written contract in the purchase or sale of cotton futures under the act of Congress, and these slips provide that the contracts they evidence shall comply with both the Cotton Futures Act and the rules of the Exchange. There is nothing in the rules of the Exchange cited which prohibits or is inconsistent with such a compliance. The legal presumption is that these contracts were made in accordance with the provisions of both. All that the Cotton Futures Act requires is that the contracts of sale shall be evidenced by written memoranda signed by the parties to be charged. These contracts are so evidenced, and even if they were verbal contracts before they were evidenced by a writing or the written memoranda, yet, when

they were evidenced thereby within a day of two after the bids were made which preceded the contracts they were as complete a compliance with the Cotton Futures Act as they would have been if the written memoranda had been made a few hours earlier. Nothing in contradiction of or inconsistent with section 5 of the act, or with the compliance therewith is found in the rules of the Cotton Exchange, the buyers' and sellers' slips, or in the sales or purchases they evidenced. (4) Because some of the slips—for example, the sellers' slip signed by C. P. Ellis & Co.—evidenced several sales, the third and sixth of which, charged in the Ellis slip, one of the plaintiffs testified were bought by them for the defendant, and his counsel argues that this slip was not a compliance with the act, and that the testimony selecting these items of purchase was incompetent, because the slip itself fails to identify the purchases evidenced thereby bought for Mr. Browne; but, as has already been said, brokers buying and selling for undisclosed persons on the Cotton Exchange are the buyers and sellers within the meaning of the Cotton Futures Act, and are not required thereby to disclose in their slips the names or addresses of those for whom they buy or sell. This is not an action to enforce these contracts. It is an action for a balance of an account for purchasing and selling cotton futures for the defendant, and the testimony of the plaintiffs as to what particular parts of the cotton futures which they made valid contracts to buy or to sell they bought or sold in obedience to defendant's orders was clearly competent and material against him.

The conclusion of a consideration of all the objections to the slips offered in evidence is that they complied with the requirements of the United States Cotton Futures Act and that the court fell into an error (1) in refusing to admit them in evidence; (2) in refusing to admit in evidence parol evidence that the plaintiff signed and delivered a corresponding buyers' slip to the sellers and a corresponding sellers' slip to the buyers who signed the respective slips offered in evidence; (3) in ruling out of the case practically all of the other evidence offered by the plaintiffs, a large part of which was competent and material, on the erroneous view that the slips offered in evidence failed to evidence contracts in compliance with the Cotton Futures Act; (4) and especially in ruling out the parol evidence in explanation of the defendant's telegram "Stop ten seventeen twenty and ten seventeen fifteen" and other trade terms.

[7] Passing from these slips and the rulings in the trial of the case, counsel for the defendant also contends that, notwithstanding the errors which have been mentioned, the judgment for the defendant should be affirmed, because the transactions out of which the claim of the plaintiffs arose were gambling transactions. Whether they were or not was an issue of fact before the jury. The seventh amendment to the Constitution reads:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

"This," said the Supreme Court in Parsons v. Bedford, 3 Pet. 433, 446, 448, 7 L. Ed. 732, "is a prohibition to the courts of the United

States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings." This rule of law has often been reaffirmed in later cases. Barreda et al. v. Silsbee, 21 How. 146, 166, 167, 16 L. Ed. 86; Justice v. Murray, 76 U. S. (9 Wall.) 274, 277, 19 L. Ed. 658; Chicago, Burlington & Quincy R. R. v. Chicago, 166 U. S. 226, 246, 17 Sup. Ct. 581, 41 L. Ed. 979; Capital Traction Co. v. Hof, 174 U. S. 1, 8, 9, 19 Sup. Ct. 580, 43 L. Ed. 873. The plaintiffs accordingly were entitled to a jury trial of the question of fact whether or not the transactions regarding the purchases and sales were gambling transactions. They have been deprived of that trial, because the court below, under an erroneous view of the law upon another question, made it impossible for the plaintiffs to recover below, even if the transactions were not gambling transactions, and ruled out all the evidence they offered. The instruction to the jury to return a verdict for the defendant was made after these erroneous rulings, in the midst of the attempt of the plaintiffs to introduce their evidence, when they had not rested their case, although they had ceased to offer evidence because under the rulings of the court no amount of evidence in their favor on the question, gambling transactions vel non, or on any other issue in the case, could secure a judgment in their favor. In this state of the case the issue, gambling transactions or not, is not triable or determinable by this court, and the plaintiffs are entitled to a new trial of this entire case by a jury. This court may not lawfully affirm a judgment below on the ground that the evidence conclusively showed the defense that the transactions on which the plaintiffs relied were gambling transactions, when all the plaintiffs' evidence was excluded on an erroneous ground which made it useless for them to introduce their evidence on that issue. Baker v. Kaiser, 126 Fed. 317, 319, 320, 61 C. C. A. 303. There is nothing in the record to show that they would not have introduced persuasive and substantial evidence that the transactions were not gambling transactions, if the erroneous rulings of the court had not rendered the introduction of such evidence futile.

[8] The only theory upon which counsel for the defendant could possibly sustain the judgment is that the errors in the trial were not prejudicial to the plaintiffs. In the case in hand the verdict was not directed on the ground that the transactions relative to the purchases and sales of cotton futures were gambling transactions. The court had overruled a demurrer to the complaint and held that it stated a good cause of action. During the trial no objection or suggestions that the transactions were gambling transactions was made by counsel or the court, and the ground on which the verdict was directed was that the sellers' slips and the buyers' slips failed to comply with the requirements of the Cotton Futures Act. So it is that the rules on the introduction of evidence and the direction of the verdict were founded on a limited and untenable ground, and counsel for the defendant

seeks to sustain it on another ground. The rules of law on this subject are:

First. That when a verdict is directed on limited, but untenable, grounds, it may not be sustained on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated, if they had been called to the attention of the defeated party and he had been given an opportunity to meet them by evidence and argument at the time the direction was made. Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 922, 42 L. Ed. 302; Baker v. Kaiser, 126 Fed. 317, 319, 320, 61 C. C. A. 303.

Second. When a court has directed a verdict upon a specific, but untenable, ground, after the defeated party had been permitted to introduce all the legal evidence he offered and has rested his case, and it is clear beyond doubt, from a bill of exceptions which contains all the evidence, that the evidence would not sustain any other verdict, an appellate court may lawfully affirm the verdict on some new or other ground. And the reason that it may do so in such a case is that, when the defeated party has been permitted to introduce all the legal evidence he offered and has rested his case at the trial, he has thereby admitted, and in that way has estopped himself from denying, that he can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in his favor. Bank of Havelock v. Western Union Telegraph Co., 141 Fed. 527, 526, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181, 5 Ann. Cas. 515, and cases there cited.

The case at bar does not fall under the second rule, nor under its reasons or conditions. The plaintiffs were not permitted to introduce the legal evidence they offered, but all of it was excluded, and the erroneous rulings of the court made it useless for them to introduce evidence on the issue of gambling transactions or not. It is not clear beyond doubt that if the plaintiffs had been permitted to introduce the evidence that was ruled out, and the objection that the evidence that the transactions were not gambling transactions was insufficient had been called to their attention before the verdict was delivered, they could not or would not have obviated that objection by other testimony. The case therefore falls under the first rule, and the question whether or not the record in this case conclusively proved that the transactions were gambling transactions is not reviewable by this court, and the judgment below must be reversed.

And, finally, if that question were reviewable, the record did not sustain a finding that the pleadings and evidence in the case so conclusively show that the transactions were gambling transactions that that issue was not for the jury, and that because, first, the court below adjudged on a general demurrer to the complaint that the latter stated a good cause of action; in other words, that it did not show that the transactions were gambling transactions; that ruling was not changed at the trial or before the verdict was directed, and it cannot now be questioned by the defendant for he has sued out no writ of error; second, because all the evidence offered was ruled out on the objection or motion of the defendant, and he is now estopped from denying that there is no evidence whatever in the case because that is the fact,

therefore there is, and was when the verdict was directed, no evidence in the case that the transactions were gambling transactions; and, third, if the complaint and the excluded evidence could be lawfully considered by this court at this time on this question of gambling transactions or not, they would not so conclusively prove that the transactions were gambling transactions as in our opinion to warrant the withdrawal of that question from a trial by a jury.

Let the judgment be reversed, and let the case be remanded to the court below, with instructions to grant a new trial.

CARLAND, Circuit Judge (dissenting). I cannot concur in the views of the majority. The plain case as shown by the record appears to me as follows:

Thorn & Maginnis sued Browne to recover the amount paid out by them at the request of defendant and for his use in and about the purchase and sale of 2,000 bales of cotton on the New Orleans Cotton Exchange and commissions for their services in buying and selling such cotton. The case, after issue joined, came on for trial, and the plaintiffs offered to show: That upon the telegraphic request and upon the account and risk of the defendant they purchased cotton on the New Orleans Cotton Exchange for May delivery as follows:

January	25,	1917	200	bales at	16.83	cents	per	pound
"	"	"	400	"	16.84	"	"	"
"	27	"	200	"	17.06	"	"	"
"	29	"	400	"	17.08	"	"	"
"	"	"	300	"	16.88	"	"	"
"	30	"	200	"	16.93	"	"	"
"	31	"	300	"	17.13	"	"	"

That on February 1, 1917, at the telegraphic request of defendant, they sold for his account and risk 2,000 bales of cotton on the New Orleans Cotton Exchange for May delivery at the price of 14 cents per pound. That in the purchase and sale of said cotton plaintiffs paid out and advanced for the defendant the sum of $29,675, and earned in commissions the sum of $300. That no part of the same had been paid, except the sum of $6,760. Plaintiffs further offered to show that, at the time of the purchase of the cotton above mentioned, each vendor executed and delivered to plaintiffs a memorandum in writing, of which the following is a sample:

"New Orleans, La., Jan. 25, 1917.

"C. P. Ellis & Co., Cotton Exchange Building, sold to Thorn & Maginnis, of New Orleans, La., and agreed to deliver them subject to the by-laws, rules and conditions of the New Orleans Cotton Exchange and subject to the United States Cotton Futures Act, § 5.

Bales Cotton.	Delivery.	At Cents per Pound for Middling.
One hundred	May	16.70
Three "	"	16.83
Two "	"	16.83
One "	"	16.90
Two "	"	16.81
One "	"	16.84

"C. P. Ellis & Co., of New Orleans, La."

That at the time the 2,000 bales of cotton were sold the purchasers executed and delivered to plaintiffs a memorandum in writing, of which the following is a copy:

"Office of Thorn & Maginnis, 209 Varieties Place.

"New Orleans, La., Feb. 1, 1917.

"Bought from Messrs. Thorn & Maginnis, of New Orleans, La., and agreed to receive from them subject to the by-laws, rules and conditions of the New Orleans Exchange and subject to the United States Cotton Futures Act, § 5:

Bales Cotton.		Delivery.	At Cents per Pound for Middling.
Twenty	hundred	May	14. cts.
One	"	"	14.20
One	"	"	14.25
One	"	July	16.10
One	"	May	14.45
Three	"	July	16.10
One	"	"	16.10
One	"	May	14.80
One	"	May	14.50

"Airey & Stouse, of New Orleans, La."

The trial court excluded all evidence relating to the purchase and sale of the cotton for the reason that the purchases and sales were made in violation of the Cotton Futures Act (39 Stat. 476). This ruling resulted in a directed verdict for the defendant. Counsel for plaintiffs claim that the exclusion of the evidence offered and resulting verdict was error. Counsel for defendant contends that the ruling of the trial court was right for the following reasons:

That the contracts of purchase and sale were made in violation of the Cotton Futures Act, in the following particulars: (a) The memorandums offered were only a memorandum signed by the vendee in the sale of the cotton, and memorandums signed by the vendors in the purchase of the cotton, there being no signature of the vendor in the sale of the cotton or by the vendees in the purchase of the cotton. (b) That if the memorandums offered can be held to be the contract referred to in section 3 of the Cotton Futures Act (Comp. St. § 6309c), they did not specify the time of delivery. (c) They were not signed by the party to be charged, or by his agent in his behalf. (d) The names and addresses of the seller and buyer were not mentioned. (e) The memorandums were in violation of the regulations of the Treasury Department. (f) The purchase and sale of cotton under the facts offered to be shown were criminal offenses in which the plaintiff participated as aiders and abettors, and for that reason they cannot recover for disbursements made or commissions earned.

The following sections of the Cotton Futures Act are relied on by the counsel for defendant:

"Sec. 3. That upon each contract of sale of any cotton for future delivery made at, on, or in any exchange, board of trade, or similar institution or place of business, there is hereby levied a tax in the nature of an excise of two cents for each pound of the cotton involved in any such contract.

"Sec. 4. That each contract of sale of cotton for future delivery mentioned in section 3 of this act shall be in writing plainly stating, or evidenced by written memorandum showing, the terms of such contract, including the quantity of the cotton involved and the names and addresses of the seller and

buyer in such contract, and shall be signed by the party to be charged, or by his agent in his behalf. If the contract or memorandum specify in bales the quantity of the cotton involved, without giving the weight, each bale shall, for the purposes of this act, be deemed to weigh five hundred pounds.

"Sec. 5. That no tax shall be levied under this act on any contract of sale mentioned in section 3 hereof if the contract comply with each of the following conditions:

"First. Conform to the requirements of section 4 of, and the rules and regulations made pursuant to, this act.

"Second. Specify the basis grade for the cotton involved in the contract, which shall be one of the grades for which standards are established by the Secretary of Agriculture, except grades prohibited from being delivered on a contract made under this section by the fifth subdivision of this section, the price per pound at which the cotton of such basis grade is contracted to be bought or sold, the date when the purchase or sale was made, and the month or months in which the contract is to be fulfilled or settled: Provided, that middling shall be deemed the basis grade incorporated into the contract if no other basis grade be specified either in the contract or in the memorandum evidencing the same."

Subdivision 7 of section 5 provides as follows:

"The provisions of the third, fourth, fifth, sixth, and seventh subdivisions of this section shall be deemed fully incorporated into any such contract if there be written or printed thereon, or on the memorandum evidencing the same, at or prior to the time the same is signed, the phrase 'Subject to United States Cotton Futures Act, Section 5.'"

"Sec. 11. That the tax imposed by section 3 of this act shall be paid by the seller of the cotton involved in the contract of sale, by means of stamps which shall be affixed to such contracts, or to the memoranda evidencing the same, and canceled in compliance with the rules and regulations which shall be prescribed by the Secretary of the Treasury." Comp. St. § 6309*l*.

"Sec. 12. That no contract of sale of cotton for future delivery mentioned in section 3 of this act which does not conform to the requirements of section 4 hereof, and has not the necessary stamps affixed thereto, as required by section 11 hereof shall be enforceable in any court of the United States by, or on behalf of, any party to such contract or his privies." Comp. St. § 6309m.

"Sec. 14. That any person liable to the payment of any tax imposed by this act who fails to pay, or evades or attempts to evade the payment of such tax, and any person who otherwise violates any provision of this act, or any rule or regulation made in pursuance hereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than $100 nor more than $20,000, in the discretion of the court; and, in case of natural persons, may, in addition, be punished by imprisonment for not less than sixty days nor more than three years, in the discretion of the court." Comp. St. § 6309o.

The contention that the trial court was right in directing a verdict on the ground that the evidence offered showed a gambling transaction will not be considered, as the trial court made no ruling in relation thereto. The defendant, it is true, pleaded this defense, but none of the objections to the introduction of evidence were based on this ground, and the trial court made no reference thereto in any of its rulings, but, on the contrary, ruled in the exclusion of evidence with reference to the Cotton Futures Act.

Coming to the Cotton Futures Act, I may say that, as the present action is not one to enforce the contracts for the purchase and sale of cotton, section 12 of that act above quoted has no application. The serious question presented by the record is this: Laying aside the ques-

tion of gambling, did the evidence offered show that the plaintiffs knowingly engaged in an illegal business or transaction in the purchase and sale of the cotton? If so, plaintiffs cannot recover, and the exclusion of the evidence was not error. Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819, supra; In re Green, 7 Biss. 338, Fed. Cas. No. 5,751; Melchert v. Tel. Co. (C. C.) 3 McCrary, 521, 11 Fed. 193; Bartlett v. Smith (C. C.) 13 Fed. 263; Raymond v. Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170; Cobb v. Prell (C. C.) 15 Fed. 774; Steers v. Lashley, 6 T. R. 61; Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269; Fareira v. Gabell, 89 Pa. 89; North v. Phillips, 89 Pa. 250; Ruchizky v. De Haven, 97 Pa. 202; Dickson's Ex'r v. Thomas, 97 Pa. 278; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Tenney v. Foote, 95 Ill. 99; Phelps v. Holderness, 56 Ark. 300, 19 S. W. 921.

Whether the business was illegal depends upon the fact as to whether it was conducted in violation of the Cotton Futures Act, as section 14 of that act, above quoted, makes it a crime punishable by fine and imprisonment for any person to violate any of its provisions. There is no pretense that the tax imposed by section 3 was paid. Section 5, however, provides that the tax need not be paid on any contract of sale, if the contract comply with the conditions named in said section. Assuming that the memorandums offered in evidence constituted the contract mentioned in the Cotton Futures Act, it appears that they contain this indorsement: "Subject to the United States Cotton Futures Act, Section 5." Under the law, this incorporated into the contract all of the provisions of section 5, except subdivisions first and second. The weight of the cotton not being mentioned, each bale was deemed under the law to weigh 500 pounds. The memorandums of purchase and sale offered in evidence were signed only by the brokers who sold the cotton and by the vendee who bought the same. This being so, counsel for defendant contends that the memorandums were not signed by the party to be charged or by his agent in his behalf. I see no merit in this contention, as the Cotton Futures Act does not make it necessary for the agent to say, when he signs the contract or memorandum, that he signed it in behalf of his principal, meaning him. To hold otherwise would be to abolish the law in regard to the acts of an agent for an undisclosed principal. The plaintiffs show they were the agents of the defendant, and acted as such in the purchase and sale of the cotton; and this either party could do, even in cases where the law requires the contract to be in writing (Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Ford v. Williams, 21 How. 287, 16 L. Ed. 36); the only exceptions being instruments under seal and promissory notes (21 R. C. L. 891). The contention that the memorandums did not specify the time of delivery has no merit. The memorandums all bore dates in January and February, 1917, and specified May as the time of delivery. This could only mean May, 1917. The contention that the names and addresses of the seller and buyer are not mentioned is based upon the fact that the names and addresses of the brokers alone were mentioned. Under the rules of the Cotton Exchange, only members thereof may

buy or sell cotton on the Exchange. The brokers, so far as the Exchange is concerned, are the buyers and sellers.

Congress, in legislating as to the sale of cotton for future delivery on the Cotton Exchange, must have been familiar with the manner of transacting business thereon, and as to who are called sellers and buyers. It is claimed that the written memorandums are in violation of the regulations of the Treasury prescribed under the Cotton Futures Act in this: That the memorandums refer to the rules of the Cotton Exchange which permit verbal contracts, but to refer in a written contract to the provision in the rules mentioned would not violate the Treasury regulation if the verbal contract could not be substituted for the written one.

I am satisfied that, if the memorandums offered could be held to be the contracts referred to in the Cotton Futures Act, then they comply substantially with the provisions of section 5; but, conceding they do comply with the provisions of section 5, it still remains to be determined: Are they evidence of a contract? Are they, standing alone, evidence of a written contract? The difficult question in the case is: What did Congress mean by the following language found in section 4: "And shall be signed by the party to be charged, or by his agent in his behalf." An instrument in writing, not signed by both seller and buyer, would not constitute a contract in writing. It is provided by rule 47 of the New Orleans Cotton Exchange as follows:

> "It shall be the duty of the seller, on the day on which transactions in contracts take place, or at not later than 9 a. m. on the following day, to furnish a contract or slip, and deliver his own already signed, and the opposite one in blank to the buyer; the latter shall then sign his contract, or slip, and return it to the seller."

Notice may be taken that this is the manner of doing business on the great exchanges of the country. Sometimes the instruments executed are called buyers' slips or sellers' slips; sometimes bought and sold notes. Nicol v. Ames, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786. The language used by Congress, above quoted, would seem to be unfortunate, as Congress could not make an instrument signed by one party only a contract.

Some courts, in deciding questions under the statute of frauds, have decided that a party to a contract which the law required to be in writing, who did not sign the same, may enforce the contract against the party who did, and the language used by Congress might have come from this source; but, as the language, if literally interpreted, would be meaningless, because both the seller and the buyer are to be charged in any contract for the purchase or sale of cotton, I think it must be held that the language means that any party to the contract who is to be charged thereby must sign it, either himself or by his agent. Moreover, this is not a suit to charge either party to the contracts of purchase and sale.

Counsel for plaintiff at the trial offered oral evidence to show that Thorn & Maginnis signed contracts agreeing to purchase cotton from the brokers who signed the memorandums which were offered in evidence similar in all respects to the contracts offered, except that they

read "bought from," instead of "sold to," and that each of them contained the exact wording of ones offered with that exception, and were delivered to the brokers signing the memorandums offered: that these other brokers were all residents and citizens of the state of Louisiana, and that said instruments were in the state of Louisiana, and outside of the jurisdiction of the court. The trial court denied this offer, for the reason that the evidence offered was not the best evidence, and there had been no sufficient effort made to obtain the originals or copies thereof to allow the introduction of secondary evidence as to their contents. I think the court was right in this ruling. Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299, and Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641, decide nothing to the contrary. It is not clear whether any such offer was made with respect to the sale of the 2,000 bales of cotton. It is contended that, the present suit not being on the contracts, the evidence offered was collateral to the main issue, and therefore it was not necessary to produce the original contracts or copies. I cannot agree that the evidence was offered on a collateral issue. It stood without contradiction in the case that the tax provided by law on the purchase and sale of cotton at the New Orleans Cotton Exchange had not been paid. The purchase or sale without such payment was a crime under the Cotton Futures Act. The plaintiff participating in such offense could not recover for their disbursements and commissions unless they showed they complied with those provisions of the Cotton Futures Act, which would relieve them from the payment of the tax. It was consequently one of the important issues for the plaintiffs to meet. The law is that the agent must know that he is committing an illegal act, but in this instance the plaintiffs were bound to know the law, and, as they knew the facts, they must be held to have knowingly transacted the business. Whatever offense was committed, the plaintiffs were aiders and abettors therein, and under section 332 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. § 10506]) were principals.

It thus appears on the face of the record that Browne or his agents, Thorn & Maginnis, did not sign the memorandums offered in evidence, and if there were buyer and seller slips signed and executed by Thorn & Maginnis in connection with the purchase and sale of the cotton in controversy, they have not been produced, and for all the purposes of this case, must be treated as not having been executed. With the case in this position, I am of the opinion that, so far as the present record is concerned, the Cotton Futures Act was violated in this: That no tax was paid as provided by law on the purchase and sale of the cotton on the New Orleans Cotton Exchange, nor has there been shown such a compliance with the Cotton Futures Act as would relieve the sellers from the payment of the tax. The transaction in regard to the purchase and sale of the stock was therefore illegal.

In such cases, the law will leave the parties where it finds them, not lending its aid to either. The plaintiffs therefore may not recover.

(257 Fed. 481)

STANDARD OIL CO. v. HOWE et al. (No. 3248.)

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919. Rehearing Denied June 6, 1919.)

1. TAXATION ⟹168—FOREIGN OIL COMPANY—FAILURE TO FIX CASH VALUE OF INCOME—"INTANGIBLE PROPERTY."

Under Civ. Code Ariz. 1913, par. 4834 et seq., requiring the assessment of all taxable property at its full cash value, the tax commission and board of equalization of Arizona had no authority to ignore the cash value of a foreign oil company's property and to tax its intangible property, fixed with an arbitrary value by capitalizing at 25 per cent. its earnings or income, by assessing the valuation against the company generally, not upon any specific items of its property; there being no authority for taxation of earnings, while "intangible property" includes only franchises, credits, choses in action, and the like.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Intangible Property.]

2. TAXATION ⟹498—RESTRAINING ASSESSMENT—INADEQUACY OF LEGAL REMEDY—MULTIPLICITY OF SUITS.

Where an oil company, whose "intangible property" was improperly and illegally assessed by the Arizona tax commission and the board of equalization of the state, would become involved in a multiplicity of suits involving a common question of law if it attempted to utilize any remedy under Civ. Code Ariz. 1913, par. 4887, it is entitled to equitable relief by injunction against the tax commission and the board of equalization.

3. COURTS ⟹335(1)—FEDERAL COURTS—CONTROL OF STATE STATUTE—COLLECTION OF TAX—INJUNCTION.

The federal courts, in the exercise of their equity jurisdiction, are not bound by Civ. Code Ariz. 1913, par. 4939, forbidding injunction against the state or any officer to prevent the collection of a tax levied under provisions of law.

4. TAXATION ⟹397—OIL COMPANIES—UNIT RULE—STATUTES.

Civ. Code Ariz. 1913, pars. 4951–4979, providing for the unit rule of value in the taxation of private car lines, railroad property, and telegraph and telephone lines, do not authorize the unit rule valuation for taxation of the property of a foreign oil company, or for the distribution of the unit value between counties in which the property is situated.

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Suit by the Standard Oil Company, a corporation, against Charles R. Howe and others, members of the Tax Commission and of the Board of Equalization of the State of Arizona, and others. From a decree denying prayer for injunction and sustaining defendants' motion to dismiss the bill of complaint, plaintiff appeals. Decree denying the writ and dismissing the bill reversed, and cause remanded, with instructions to issue a temporary injunction.

The Standard Oil Company, a California corporation, has appealed from a decree of the District Court of Arizona denying appellant's prayer for a temporary injunction and sustaining the appellee's motion to dismiss its bill of complaint. The question presented involves the validity of the action of the state board of equalization of Arizona in ordering the assessed value of the property of the Standard Oil Company for the year 1917 to be increased from $342,706, as fixed by the county assessing and equalizing authorities, to $2,019,597.64. The facts as substantially stated by the complaint are these:

The Standard Oil Company owns real estate, motor trucks, sales stations, and like property in various counties in the state of Arizona. The full cash value of the property on January 1, 1918, was $342,706. California is the state of corporate domicile, and the corporation owns, within the state of California, pipe lines, refineries, oil wells, and properties of the value of more than $40,-

000,000. It manufactures gasoline, engine distillate, lubricating oil, and by-products of petroleum in California, and sells and disposes of such products in California and other states and territories in interstate commerce. The Arizona board of equalization determined that appellant's net profits on its Arizona sales for 1917 were $727,649.41. It proceeded then to capitalize those earnings at 25 per cent., and thus produced a total value of $2,910,597.64. From this last-named sum the amount of $342,646, or the value that had been put upon the properties by the county authorities, was deducted, and the difference became the increase complained of in this proceeding. The state board ordered the increase upon all of appellant's property en masse, without any specific increase as to any particular piece or item or class of property.

The complaint alleges that it was not found or determined by the board that any particular item or class had been undervalued by the county authorities, or that any increase in valuation was necessary for any purpose for equalizing taxes or valuation. In a communication to appellant, the board stated that intangible property was made assessable in Arizona, and the method of arriving at the intangible value of the property of the Standard Oil Company was by deducting the net income for 1917 in Arizona, as per the sworn report of the corporation, and deducting therefrom the federal tax paid, which would leave the true net business of the company in Arizona for 1917 as $727,649.41. The board also wrote as follows: "Assuming that this class should earn 25 per cent. net on its assessed valuation, and capitalizing the above true net income at 25 per cent., the total valuation shown, both tangible and intangible, is $2,910,597.64. Deducting from this figure the total amount of your assessments in the several counties, amounting to $342,646, leaves a balance of $2,567,951.64, the amount of the raise." The board advised the company that other oil companies and classes of property were similarly treated, and after specification of certain itemized classifications the letter continued: "From the above table you will note that oil companies are placed in the highest classification and are allowed to earn 25 per cent. on their assessed value, while railroads are only allowed 8 per cent., banks 12½ per cent., and producing mines and smelters 15 per cent."

After arriving at the valuation as outlined, the board effected a distribution of this valuation increase among the 13 counties of the state. The method employed was to require the corporation to segregate its gross sales made in the several counties, respectively, and upon the basis of such segregation it was ordered that the total increase be divided among the counties in the proportion of their several contributions to the corporation's gross sales, without reference to actual value of the properties involved. The board then directed the various county authorities to enter the increase upon their assessment rolls, respectively, and to use this language: "Tangible and intangible valuation on property above enumerated, as set forth in section 4847, Revised Statutes of Arizona 1913, Civil Code, based on excessive earnings." County authorities conformed to the order of the state board, and the state board proceeded to levy taxes for 1917, and fixed the rate for state purposes at 39 cents for each $100 of assessed valuation. The county authorities in turn proceeded to complete and make the levies accordingly for county, school, and municipal purposes. The state board, however, failed to instruct the county board how to distribute the increase among the several incorporated towns, cities, school districts, and local assessment districts within their several limits. As a result the county authorities extended the raise upon the assessment roll in gross, without division or distribution thereof among or between appellant's real estate or improvements thereon, or personal property, leaving such real and personal property listed and assessed for state and county purposes at the valuation originally placed thereon by the county authorities, adding thereto, however, the form of entry specified by the state board and heretofore quoted. In the distribution of the increase for town, city, and other local assessment purposes, the county authorities split up and distributed the raise among such subdivisions in a manner devised to suit themselves, and as a result it is said to be impossible to ascertain the total valuation intended to be placed or the amount of taxes actually levied upon any article, part, piece, or parcel of appellant's property, whether real or personal, and whether for state, county, municipal, school, or other local uses.

The actual figures used by the state board in making up the increase were

taken from a financial report filed by the Standard Oil Company with the state tax commission on May 1, 1918, as authorized by section 4829, subdivision 6, Revised Statutes of Arizona 1913. That report shows a total income from gross sales of $5,299,168.65, made up of sales of fuel oil, $2,164,631.63, gasoline, $2,129,008.36, and other products, $1,005,528.66. All of the fuel oil was sold and delivered by appellant pursuant to contracts negotiated with the purchasers outside of the state of Arizona and was loaded and delivered by it to the purchasers on cars at appellant's distributing points in California, and thence transported by common carriers direct to the consignee in Arizona, without being handled by any of appellant's Arizona branches or agencies. All of the gasoline and other products, except as stated in the complaint, were refined and produced by appellant in California, and were shipped to Arizona to be there sold and delivered direct to purchasers and consumers. Part of the gasoline and other products, of the value of $217,453.52, were loaded and delivered by appellant to purchasers thereof on board cars at appellant's plants and distributing points in California, and were transported directly by common carriers to the purchasers in Arizona, pursuant to sales negotiated in Arizona, but without passing through or being handled by any of appellant's branches or agencies. A large part of the gasoline and of the other products were sold and distributed by appellant in Arizona in the original packages and containers in which the same had been placed by it at its plants and manufactories in California. The item of $951,378.82, net income from operations shown on the report of the corporation, represents the net profit derived by the corporation from its plants, properties, and equipment in the production, purchase, transportation, refining, and manufacture of products in California, and includes the profits accruing to appellant through the operation of its sales plants and agencies, both in California and Arizona.

The corporation alleges that the action of the board was willful, arbitrary, and constructively fraudulent; that the order for the increase was made upon an assumed earning capacity, which includes the earnings and income produced in California, as well as in Arizona; and that the effect of the action of the board is to tax in Arizona property situate in California, as well as to tax the appellant's transaction of interstate commerce business.

Appellant appeared before the state board of equalization and protested against the raise complained of, but the increase was ordered.

The corporation alleges that, if it should pay the taxes assessed, it would have no remedy at law for the recovery of any money so paid; that, if remedy is available, it would have to prosecute suits against many counties, towns, and cities, all of which would depend upon a common question of law arising upon the same facts as are here set forth by appellant; that payment under duress of threatened distraint would involve the payment of interest, costs, and penalties not thereafter recoverable in any proceeding, and that upon failure to pay the taxes here involved they would become delinquent, and the county officials would proceed to enforce the tax liens, with interest, costs, and penalties, and appellant would suffer great damage and be subjected to many suits. Appellant tenders taxes upon the cash value of appellant's properties in Arizona, and prays that, being without adequate remedy at law, the increase complained of be decreed to be void and in contravention of the federal Constitution.

A clear understanding of the issues requires reference to the Arizona statutes concerning taxation. The Constitution of the state (section 12, article 9) vests in the Legislature authority to provide for the levy and collection of license, franchise, gross revenue, excise, and income taxes, and graduated income taxes.

The state tax commission, created in 1912, derives its authority from chapter 1 of title 49, Revised Statutes of Arizona 1913, as amended by the Laws of 1915 (Laws 1915, c. 22) and 1917 (Laws 1917, c. 37). The commission has supervision of the system of taxation and over the administration of the assessment of taxes in the state and over city, town, and local boards and officials having to do with the assessment of property. It may assess the "property, franchise and all intangible values" of railroad and tele-

graph and telephone corporations, excepting certain nonoperating properties and certain public service corporations.

The state board of equalization, created by the Laws of 1913 (chapter 2 of title 49, and particularly paragraph 4834 of the Statutes of Arizona), has full authority to equalize the value and assessments of property throughout the state, and to equalize the assessments of all property in the state between persons, firms, or corporations of the same assessment district, between cities and towns of the same county, between the different counties of the state, and the property assessed by the state tax commission in the first instance. The board of equalization fixes the rate of taxation for state purposes to be levied and collected in each county, examines and compares abstracts, and equalizes assessments, so that all the taxable property in the state shall be assessed at its full cash value subject to rules specified in paragraph 4834 of the statutes. The board of equalization may increase the individual assessments which appear to be too low, first giving notice to the individuals or corporations of their intention to do so. The board is required to transmit to the various county boards of supervisors statements of changes, together with the rates of taxes to be levied and collected.

County taxes are under the supervision of the respective county boards of supervisors. The statutes (paragraph 4846) require that all property in the state, except specifically exempted property, is subject to taxation, but there shall be no double taxation. By paragraph 4847 it is provided that money, goods, chattels, choses in action, evidence of debt, and any interest or equity in, or valid claim to, nonpatented mining claims, shall be personal property, and personal property is declared "to mean and include all property of whatsoever kind or nature, both tangible and intangible, not included in the term real estate," as said term is defined in the section. Paragraph 4849 requires that all taxable property must be assessed at its "full cash value"; that is, "the price at which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property is usually sold, and not the price which might be realized if such property were sold at a forced sale." County assessors must complete their assessment rolls and deliver them to the clerk of the board of supervisors before a certain date each year. The board of supervisors of the county constitutes a county board of equalization, with power to increase individual assessments after notice.

By paragraph 4887, a taxpayer, if dissatisfied with the amount of his assessment as fixed by the board of equalization, may appeal to the superior court of the county, where, by following a prescribed proceeding, review of such assessment may be had. It is required, as a condition precedent to taking such appeal, that the taxpayer shall pay to the county treasurer the full amount of the taxes levied and assessed in accordance with the valuation fixed by the board of equalization. If the court shall find that the assessment is excessive, and that any excess sum has been paid, judgment for refund will be given.

By paragraph 4845 every tax levied is made a lien upon the property assessed, and not to be satisfied or removed until such tax, penalties, charges, and interest are all paid, or the property has absolutely vested in a purchaser under a sale for taxes. The assessment roll must describe real estate by metes and bounds, or common designation or name, and show the full cash value of all real estate and improvements thereon, and the cash value of all personal property.

In case of delinquency the county treasurer is required to make a levy upon all property described in the assessment roll for the taxes which are delinquent, and thereafter he is authorized to levy upon, seize, and distrain personal property and sell the same for taxes. Provision is made for suits to collect delinquent taxes, and for the sale of real property pursuant to judgment, and for the execution of deeds to purchasers after period of redemption has expired.

By paragraph 4939 there can be no test of the validity of a tax upon real or personal property, unless the amount of such tax shall have been paid to the county treasurer, together with penalties thereon, and "no injunction shall ever issue in any suit * * * in any court against this

state, or against any county, municipality, or officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of law; but, after payment, action may be maintained to recover any tax illegally collected, in such manner and at such time as may now or hereafter be provided by law." In case the amount of taxes due shall be finally determined to be less than the amount so paid, the excess shall be refunded in the manner provided in title 49, paragraph 4887, of the act.

Municipal and county taxation are combined (chapter 37, Laws of 1917), to the end that there may be but one assessment of property for the purposes of state, county, city, and incorporated town. Valuations, after equalized and determined by the state board of equalization, become those for the purposes of all taxes. Levies for all city, town, and municipal purposes are made by the governing bodies thereof, and the county assessor extends and carries out such taxes upon the county assessment roll. All taxes for cities, towns, and other municipalities are collected by the county treasurer in the manner in which he collects state and county taxes, and thereafter the amounts due are paid over by him to the treasurers of the cities or municipal corporations, as may be. The provisions of law pertaining to delinquency and collection of taxes are applicable to cities, towns, and municipal corporations. There seems to be a lack of provision for the refund or recovery of taxes after they have been paid to cities, towns, or municipal corporations. This is to be mentioned, because it appears that there are certain town and city taxes involved herein, for instance, taxes in Phœnix, Bisbee, Douglas, Flagstaff, Clifton, Safford, Mohave, Hayden, Ray, and Nogales.

John Mason Ross, Everett E. Ellinwood, and Clifton Mathews, all of Bisbee, Ariz., and E. S. Pillsbury, Oscar Sutro, and Pillsbury, Madison & Sutro, all of San Francisco, Cal., for appellant.

Wiley E. Jones, Atty. Gen., and Clyde M. Gandy and George W. Harben, Asst. Attys. Gen., of Phœnix, Ariz., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The requirement of the several statutory provisions quoted being that the property of the appellant corporation shall be taxable at its full cash value, has the board exceeded its authority, or has it proceeded upon a fundamentally erroneous principle, in making the assessments involved herein? From the facts heretofore stated, it is evident that the rule of assessment expressed and adopted by the board was that appellant oil company should be "allowed" to earn 25 per cent. on the assessed value of its property. The basis for such a rule was found in the consideration of what were called by the board "excessive earnings," or what was regarded as "intangible" property, not included in the term "real estate." The position of the board is that the method followed was "what is known as the capitalized income plan" for ascertaining or valuing the intangible property of the corporation assessed, and it is argued that the board used the term "excessive earnings" in its ordinarily accepted meaning, intending to convey the information that the increase was on that part of the capitalized income over and above the value of the tangible property, and it is said that such method resolves itself into a simple assessment of intangible valuation.

But there is no statutory authority in Arizona for taxation of the earnings of the appellant corporation; nor is there any provision which authorizes the board to judge of what earnings are excessive, or as

to how heavily such earnings may be taxed. As a general thing, intangible property includes franchises, credits, choses in action, and the like. Commonwealth v. Cumberland Co., 124 Ky. 535, 99 S. W. 605. None of these is included in the present matter; and apparently there was no attempt to bring the assessment within any such inclusions. There was no indication given by the board of any valuation placed upon taxable, intangible property, other than as heretofore indicated, and the increase ordered upon "tangible and intangible valuation of the real and personl property," based on excessive earnings, was made upon the real and personal property en bloc. The judgment of the board seems to have been exerted merely with the purpose of fixing a percentage on the assessed value which, in the opinion of the board, the appellant should be allowed to earn. Having determined that point, the board proceeded to capitalize appellant's earnings at the rate fixed. The next step was to increase the assessment of the corporation to the figure thus arrived at without regard to the cash value of the property owned by the corporation. According to the record, the valuations which were originally put upon the real and personal property by the county authorities were not changed as they appeared upon the several assessment rolls, and the language used by the board with respect to the valuation based on excessive earnings and quoted in the statement of the case appears upon each assessment roll, followed by the distributive share of the total raise in each county. It is impossible to ascertain what value is meant to be put upon the real or personal property of the appellant, or upon its stocks of merchandise, or to say what amount of taxes was meant to be levied upon any of the property of the appellant for city, county, or municipal purposes.

The board argues that its action is not to be judged by the descriptive words used in placing the added assessment on the tax rolls as "tangible and intangible valuation"; that this would, at most, be irregularity, as also were the words "based on excessive earnings." We readily grant that the inapt use of words ought not to render an official assessment void. But when, in the scheme of assessment, we find the careful and continued use of language, and such language has been followed by the distributed portion of the total increase, that argument does not square with the expressions used and the acts done. In the Opinion of the Justices, 220 Mass. 613, 108 N. E. 570, the Supreme Judicial Court of Massachusetts held that property in that state must be taxed upon an ad valorem basis, and that a statute which would undertake to require the valuation of certain classes of property for taxation by capitalizing the income produced thereby at certain rates would be invalid. The court said of such a proposed measure:

> "It does not rest the assessment upon any uniform method. It enables the Legislature or a public officer to readjust the multipliers according to a fluctuating judgment of what may be desirable, even to the extent of accomplishing in practice great disproportion. The theory behind the bill would permit manifold classifications of diverse kinds of real as well as personal estate. If extended to its logical conclusions, it would be difficult to trace any remaining constitutional protection to the taxpayer."

[2, 3] Upon the foregoing branch of the case we place our decision that the action of the board was fundamentally erroneous in principle, the assessment was unwarranted in law, and we think appellant should not be denied equitable relief. Assuming that there is a remedy provided by the statutes of the state, an assumption which appellant has forcibly argued is not justified, the enforcement of such remedy would, under paragraph 4887 already referred to, involve a multiplicity of suits involving a question of law common to all of them. A single action at law would not suffice. Union Pacific R. Co. v. Weld County, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110; Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761; Raymond v. Chicago Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; Oelrichs v. Williams, 15 Wall. 211, 21 L. Ed. 43; Johnson v. Wells Fargo, 239 U. S. 234, 36 Sup. Ct. 62, 60 L. Ed. 243. Nor are the federal courts, in the exercise of their equity jurisdiction, bound by paragraph 4939, heretofore quoted, which forbids injunction against the state or any officer thereof to prevent the collection of a tax levied under provisions of law. In re Tyler, 149 U. S. 184, 13 Sup. Ct. 785, 37 L. Ed. 689; Western Union Tel. Co. v. Trapp, 186 Fed. 114, 108 C. C. A. 226.

[4] There is another important phase of the case to which we advert. We do not mean to dispute the proposition that, in arriving at the cash value of property subject to taxation, income product may properly be regarded; but it would appear that in this matter the state board considered, not merely the earnings and income produced by the property of the Standard Oil Company in Arizona, but "in far greater part" has taken into consideration the earnings and income produced by the properties of the appellant situate in California. Counsel for appellee cites Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, as authority for what is called the unit rule of valuation. In that case the Supreme Court was considering a special law of the state of Ohio which provided for a valuation of the properties of express companies upon a mileage basis. Property situated outside of Ohio was carefully excluded, but there were provisions which prescribed a method of valuation of properties as units, and directed a distribution of the unit valuation among the various counties of the state. Analogies to this legislation may be found in the statutes of Arizona, which provide for the unit rule of value in the taxation of private car lines, of railroad property, and of telegraph and telephone lines. Paragraphs 4951 to 4962, 4963 to 4970, and 4971 to 4979, Revised Statutes of Arizona 1913. The unit rule applicable to assessment of such property, however, rests upon a mileage basis, which avoids the taxation of any property outside of the state. But we are cited to no statute which authorizes the valuation of the property of the appellant oil company under the unit rule, or for the distribution of the unit value between counties in which such property is situate. In Adams Express Co. v. Ohio State Auditor, supra, it is to be noted that the Supreme Court said that—

"While the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply

for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business The same party may own a manufacturing establishment in one state and a store in another, and may make profit by operating the two; but the work of each is separate. The value of the factory in itself is not conditioned on that of the store, or vice versa; nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through different states is as an essential condition of the business united in a single specific use. It constitutes a single plant, made so by the very character and necessities of the business."

The court did not lay down a rule which would uphold a proceeding to assess the value of appellant's Arizona properties without attempting to ascertain what proportion of appellant's capital was employed in Arizona or California or elsewhere, or which authorized the fixing of the value of the Arizona properties of the appellant by capitalizing the income and profits produced by the California properties of the appellant. In Fargo v. Hart, supra, the Supreme Court reviewed an assessment of exress company properties in Indiana. There, in arriving at the total value of the property to be distributed upon a mileage basis, the taxing authorities included certain real and personal property not necessarily used in the actual business of the express company and which was outside the state of Indiana. The court said it was obvious—

"That this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning. * * * That would be taxing property outside of the state under a pretense. * * * The difference is not a mere difference in valuation; it is a difference in principle, and in our opinion the principle adopted by the board was wrong."

In Louisville, etc., R. R. Co. v. Greene, 244 U. S. 522, 37 Sup. Ct. 683, 61 L. Ed. 1291, Ann. Cas. 1917E, 97, the principle was again established that a state may not, consistently with the due process provision of the Fourteenth Amendment, include, at least as against any foreign corporation, any part of its tangible property lying without the state for purposes of taxation. Looney v. Crane, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230.

Referring again to the averments of the complaint before us, it appears that the income which has been considered by the officials of the state represented in greater part earnings and income produced by appellant's California properties. For example, it is to be taken as true that the income included appellant's entire profits upon all crude petroleum produced by it and sold in Arizona; also the whole profit upon the appellant's manufacture and sale of manufactured products distributed in Arizona. It may become of vital importance at some time to inquire whether a tax levied upon a capitalization of a profit is not a tax upon the profit, and whether a tax in Arizona upon profits produced by California properties would not be a tax on the California properties. Looney v. Crane, supra; Fargo v. Hart, supra; Union Tank Line v. Wright, 249 U. S. 275, 39 Sup. Ct. 276, 63 L. Ed. 602, decided since the submission of this proceeding.

For the reasons discussed in the first branch of the case, the decree of the District Court, denying the temporary writ of injunction and dismissing the bill, must be reversed, with costs in favor of appellant. The cause is remanded, with instructions to issue a temporary injunction.

(257 Fed. 489)

LO HOP v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1919.)

No. 3124.

1. APPEAL AND ERROR ⟹11—REVIEW—DISMISSAL.
Under Act Sept. 6, 1916, § 4 (Comp. St. § 1649a), though it was apparently the purpose to have the decree considered on both appeal and error, and the record was somewhat confused, the court will treat the case as properly before it on appeal.

2. ALIENS ⟹32(5)—CHINESE PERSONS—BURDEN OF PROOF.
One admitting that he was of Chinese descent has the burden of establishing a lawful right to remain in the United States.

3. ALIENS ⟹23(2)—CHINESE PERSONS—CHANGE OF OCCUPATION.
Where a Chinese person has been regularly admitted as a merchant, the fact that he subsequently becomes a laborer does not in itself destroy his right to remain, for such a fact is important only as it may tend to show that in reality he entered as a laborer, or for the purpose of immediately becoming a laborer, and so procured his admission through fraud, in violation of the Exclusion Acts.

4. ALIENS ⟹32(3)—CHINESE PERSONS—CERTIFICATES.
Under the treaty with China of December 8, 1894, and Act April 27, 1904 (Comp. St. § 4337), authorizing the issuing of certificates by Chinese authorities showing the mercantile status of Chinese persons desiring to enter the United States, and making such certificates prima facie evidence of the facts set forth, a Chinese person, who was admitted on the production of such a certificate, and whose deportation was thereafter sought on the ground that he had not shown his right to remain, must be advised if deportation is sought on the ground that his entry was fraudulent, for such certificates are entitled to weight, and Chinese persons should be notified of any attack thereon.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Deportation proceedings by the United States against Lo Hop. Defendant was ordered deported by the United States commissioner, and on appeal to the District Court the order was affirmed, and defendant appeals. Reversed and remanded for further proceedings.

Mulholland & Hartman and Sholto M. Douglas, all of Toledo, Ohio, for plaintiff in error.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio, and Edward J. Lynch, Asst. U. S. Atty., of Toledo, Ohio.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

WARRINGTON, Circuit Judge. [1] Apparently it was the purpose to have the decree in this case considered on both appeal and writ or error, and although the record is somewhat confused we shall, in view of section 4 of the act of September 6, 1916, c. 448, 39 Stat. 727 (Comp. St. § 1649a), treat the case as properly here on appeal. Orders to deport respondent to China were made below (1) by a United States commissioner, and on the ground (stated alike in the affidavit for arrest and the order to deport) that he is "a Chinese person found unlawfully * * * and not lawfully entitled to be or remain in the United States"; (2) by the District Court, upon appeal, for the reason that respondent "at all times since the time of his admission to the United States has been a manual laborer, and has not at any time since his said admission been a Chinese merchant and member of the exempt classes of Chinese persons within the meaning of the Chinese Exclusion Acts."

[2] At the opening of the trial in the District Court respondent admitted that he was of Chinese descent, and, presumably relying upon the settled rule imposing the burden of proof upon respondent to show a lawful right to remain in this country (Bak Kun v. United States, 195 Fed. 53, 55, 115 C. C. A. 55 [C. C. A. 6]), the government rested. Respondent then introduced evidence tending to show that before leaving for this country he had been engaged in the grocery business in China, and for three years in a drug business as a partner to the extent of $10,000 in Hong Kong, and that he had been regularly admitted to the United States, at the port of San Francisco, Cal., July 19, 1911, as a merchant. He remained in San Francisco more than a month looking for business, and then came to Toledo, Ohio; and he was in that city almost continuously until his arrest, November 21, 1914, and indeed until January, 1915, before he claims to have acquired an interest in any business concern. However, it appears by some of the testimony that meanwhile he tried a number of times, in Toledo, Cleveland, and Detroit, to purchase and engage in a mercantile business, though without success until January, 1915, when he bought a half interest in a Chinese general merchandise business in Toledo, the purchase price being subsequently paid in Hong Kong upon his order.

An authenticated copy of a partnership certificate was placed in evidence, dated January 29, 1915, purporting to have been executed in pursuance of section 8099 of the Ohio General Code, and reciting that respondent and another were "interested as partners in the partnership transacting business under the firm name and style of the Sam Wah Company, with its principal office and place of business" at a named location in Toledo. Despite this, it is to be observed of respondent's claimed purchase that his vendor is shown to have applied in Toledo, February 12, 1915, for a Chinese laborer's return certificate, and stated, among other things, that he then owned a half interest in the Sam Wah Company. This must have been the partnership interest said to have been purchased by respondent in the preceding month of January, and the testimony does not satisfactorily explain the discrepancy. It is conceivable, if indeed the sale transaction itself does not naturally import, that the sale was not to be completed

until the purchase price was paid in Hong Kong, and admittedly this did not occur until after the vendor had secured his return certificate and gone to that place.

Difficulty arises, also, from the course pursued by respondent from the time of his arrival in Toledo, say about September 1, 1911, until August, 1916. In that period he was more or less engaged in cooking in the kitchens of restaurants and a grocery in Toledo. According to his own testimony and that of several Chinese witnesses, this work was done gratuitously; yet it is clear enough that he resorted to cooking to diminish, if not entirely to meet, his living expenses while seeking favorable opportunity to engage in some kind of mercantile business; but it is not shown why he continued this practice, although not so regularly, after his interest in the partnership was actually paid for as claimed. True, such a course might have been consistent alike with the business he claims to have entered upon as a merchant and the observance of reasonable economy; in a word, it would seem that, at a time as late as the trial, convincing evidence should have been available to show that the partnership and the certificate in that behalf were a sham, if in truth they were. Above all, the course pursued by respondent after his admission is not decisive of his right to remain in this country. There are other features of the record that must be regarded as controlling.

Respondent introduced an original certificate of identity, dated July 19, 1911, and bearing the official seal and signature of the immigration official in charge at San Francisco, also setting out respondent's name, age, height, etc., and stating his occupation to be that of a merchant. This instrument purports to have been issued in conformity with a departmental regulation of March 19, 1909, and to have been "granted solely for the identification and protection of said Chinese person so long as his status remains unchanged." The inspector, who examined respondent at the time of his arrival at San Francisco, was not satisfied with certain claims he made, or with his appearance, and recommended that his application for admission be denied. The application was afterwards taken to the law division, San Francisco, where the inspector in charge and another inspector on June 23, 1911, jointly determined, "after carefully considering the case," that the recommendation for denial "be reversed and the applicant be admitted."

Furthermore, it appears that, acting in compliance with the provisions of an act of Congress there alluded to, the viceroy at Canton, who had been designated for such purposes by the government of China, issued a certificate on April 24, 1911, showing that Lo Hop was a member of one of the exempt classes described in such act of Congress, and as such had the permission of the government of China to go to and reside within the United States, after "investigation and verification of the statements contained herein by the lawfully constituted agent of the United States in this country," giving a description of Lo Hop, his former occupation as a merchant from 1902 to 1907, and his connection from 1908 to 1911 with a named firm at a stated place in Hong Kong. This certificate was viséed the following May 25th by the American consul general at Hong Kong after making, as

he says, "a thorough investigation of the statements contained" in the viceroy's certificate, and found "to be in all respects true"; the consul general further pointing out that Lo Hop was connected with a particular firm in Hong Kong which was "capitalized at $40,000 Hong Kong currency, of which his share is $10,000," that the firm "has been established for about three years and handles Chinese medicines" and "is registered in Lo Hop's name," and that Lo Hop's declared purpose in going to the United States was to start "a new concern in the business of medicine," etc., and that he was in possession of a "draft for $1,000 gold."

[3, 4] As Mr. Justice Day pointed out in Liu Hop Fong v. United States, 209 U. S. 453, 462, 463, 28 Sup. Ct. 576, 52 L. Ed. 888, article 3 of the treaty with China of December 8, 1894 (28 Stat. 1211), and the Act of Congress of April 27, 1904, c. 1630, re-enacting and continuing certain statutes there referred to (33 Stat. 428 [Comp. St. § 4337]), authorize the issue of certificates such as the one executed by the viceroy and viséed by the consul general in favor of respondent as a merchant; such certificates are by statute made prima facie evidence of the facts they set forth and, as the learned justice said in that case, "certainly ought to be entitled to some weight in determining the rights of the one thus admitted." The significance of this cannot fail of appreciation in the presence of the statements, already shown, of the viceroy and the American consul general concerning the respondent's business and financial condition before leaving China; if those officials were deceived, the fact ought to be shown, and it would not seem difficult to solve the question in a way that would be fair to both sides. The rule is that where a Chinese person has been regularly admitted, for instance, as a merchant, the fact that he subsequently becomes a laborer does not of itself destroy his right to remain; such a fact is important only as it may tend to show that in reality he entered as a laborer, or for the purpose of immediately becoming a laborer, and so procured his admission through fraud and in violation of the Exclusion Acts.[1] Lew Loy v. United States, 242 Fed. 405, 417, and see page 410 on rehearing, 155 C. C. A. 181 (C. C. A. 6); Lui Hip Chin v. Plummer, 238 Fed. 763, 764, 151 C. C. A. 613 (C. C. A. 9); Moy Kong Chin v. United States, 246 Fed. 94, 97, 158 C. C. A. 320 (C. C. A. 7); United States v. Yong Yew, 83 Fed. 832, 838 (D. C., opinion by the late Circuit Judge Adams, then District Judge); Lo Pong v. Dunn, 235 Fed. 510, 512, 513, 149 C. C. A. 56 (C. C. A. 8). Indeed, in view of its facts the rule stated is in effect recognized in Liu Hop Fong v. United States, supra, 209 U. S. at page 463, 28 Sup. Ct.

[1] This is not affected by the provision of the certificate issued by the immigration officer at San Francisco in terms to identify and protect respondent only "so long as his status remains unchanged"; for that certificate, unlike the certificates issued by the viceroy and viséed by the American consul general, is, as we have seen, a departmental regulation and designed as a measure of convenience (Sibray v. United States, 227 Fed. 1, 4, 141 C. C. A. 555 [C. C. A. 3]), and of course can be effective only so far as it is within the law (United States v. Lou Chu, 214 Fed. at 463, 464 [D. C.]; In re Tam Chung, 223 Fed. 801, 803 [D. C.]).

576, 52 L. Ed. 888. The reason underlying all these decisions would seem to find expression in the language of Judge Lowell in Re Yew Bing Hi (D. C.) 128 Fed. 319:

"Speaking generally, the Chinese Exclusion Acts are directed to prevent the unlawful coming of Chinese into the United States, and to remove those who have come in unlawfully. * * * Thus far no indication appears that a Chinaman who has lawfully entered the United States may not change his occupation after entry without risk of deportation."

Now, it is to be remembered that in the instant case the respondent was not advised of any claim on the part of the government that he had effected his entry through fraud or misrepresentation; this is true of the affidavit under which he was arrested, and, so far as appears, of the proceedings had before the commissioner; moreover the government rested its case, as we have said, simply upon an admission of respondent that he was of Chinese descent and the consequent requirement on his part affirmatively to show his right to remain here; and, further, the decree contains no finding of fraud as to respondent's entry and so is not inconsistent with a change of status and intention after his admission. The case differs in this respect from Lew Loy v. United States, supra, 242 Fed. at page 408, 155 C. C. A. at page 184, since it had there been found in the court below that Lew Loy had "really entered the United States as a laborer, and that his coming was in violation of the statutes of this government," and yet this court was constrained to grant a rehearing because of complaint that the government's counsel at the trial had made a "disclaimer of charge of fraudulent entry." 242 Fed. 410, 155 C. C. A. 186.

It follows that as respects a Chinese person who has been admitted in apparent compliance with the treaty and acts of Congress as a member of a privileged class, in any proceeding instituted for his deportation on the basis of fraudulent entry seasonable notice of a charge to that effect must be given to him so that he may have fair opportunity to meet it; anything less than this would ignore the prescribed evidential effect of certificates issued and viséed pursuant to the treaty. We therefore agree with Judge Gilbert, who in Lui Hip Chin v. Plummer, supra, when speaking of the absence of a charge that appellant had entered with the intention of becoming a laborer or had procured his certificate as a merchant through fraud or misrepresentation, said (238 Fed. 765, 151 C. C. A. 615):

"If such fraud or misrepresentation was intended to be relied upon as the ground of his deportation, he was entitled to be advised of it." Lew Loy Case, supra, 242 Fed. 411, 155 C. C. A. 181.

The decree is reversed, and the record remanded for further proceedings consistent with this opinion.

(257 Fed. 494)

HODGES v. ERIE R. CO.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1919.)

No. 3172.

1. RAILROADS ⟹350(14)—INJURIES ON TRACK—CONTRIBUTORY NEGLIGENCE—CHILD.

A three year old child is not as a matter of law guilty of negligence in passing under a standing freight train, blocking the pathway to much-used picnic grounds.

2. RAILROADS ⟹350(31)—INJURIES ON TRACK—NEGLIGENCE PER SE.

It is not negligence per se for a mother voluntarily to risk her own life in attempting to rescue her child, who had crawled under a standing freight train blocking a path to picnic grounds.

3. RAILROADS ⟹300—INJURIES ON TRACK—DUTY TO EXERCISE CARE.

Though a pathway across a railroad's track to a picnic ground was a private way, where the public was licensed to use it in crossing the tracks, a duty arose on the railroad to exercise reasonable care to avoid injury to those whose presence there reasonably might be anticipated.

4. NEGLIGENCE ⟹23(2)—RAILROADS—ATTRACTIVE NUISANCE—PETITION.

Petition against a railroad for death of a mother, who had crawled under its freight train standing on a track blocking a pathway to picnic grounds in order to rescue her three year old boy, who had previously crawled there, *held* not to state a case of attractive nuisance or of invitation.

5. RAILROADS ⟹344(3)—INJURIES AT PRIVATE CROSSING—NEGLIGENCE—PETITION.

Petition against a railroad for death of a mother, who crawled under a freight train standing on a track where it blocked a pathway to picnic grounds, in an attempt to rescue her three year old son, who had crawled under the train before her, *held* not to state a case of actionable negligence on the railroad's part.

6. PLEADING ⟹218(4)—DEMURRER—AMENDMENT.

Dismissal of action against railroad for a death on its track, on sustention of its demurrer to plaintiff's petition, *held* erroneous; it not being clear that a good cause of action could not be stated by amendment.

7. APPEAL AND ERROR ⟹750(2)—ABSENCE OF SPECIFIC ASSIGNMENT—RULE OF COURT.

Where the record does not show that plaintiff was given an opportunity to amend his petition after demurrer was sustained to it, the absence of specific assignment for failure to give such permission, as distinguished from the assignment of error in entering judgment for defendant, should not prevent review under rule 11 of the Circuit Court of Appeals (202 Fed. viii, 118 C. C. A. viii).

In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by William T. Hodges, administrator of Susanna Hodges, against the Erie Railroad Company. To review judgment for defendant, plaintiff brings error. Reversed with directions.

D. F. Anderson, of Youngstown, Ohio, for plaintiff in error.

Paul J. Jones, of Youngstown, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

PER CURIAM. Writ to review judgment for defendant on sustaining demurrer to petition.

According to the petition, after defendant's freight train, on the afternoon of a Sunday in June, had stood about half an hour on a track at the end of a public street running at right angles to the railway track, thereby blocking passage over a long-existing and well-recognized pathway in common use (to the railway company's knowledge), which pathway crossed the railway track on the extended line of the street, and led to a nearby and much-used picnic ground, plaintiff's three year old child walked along the pathway and crawled under the standing freight train. His mother (the decedent) saw the child's danger and attempted to rescue him by crawling under the train. While decedent was in that plight, the train was moved by defendant's employés, without warning, and decedent thereby killed.

The negligence charged consisted in moving the train under the circumstances stated without giving notice that it was to be moved, and in failing to have an employé stationed near the pathway to warn or prevent children from attempting to use it while the train was standing across it.

[1, 2] Whether the demurrer was rightly sustained depends solely upon the question whether the petition states a case of actionable negligence on defendant's part in killing decedent under the circumstances stated. This is so, because decedent's three year old child was not, as matter of law, guilty of negligence in passing under the train. Erie R. R. Co. v. Weinstein (C. C. A. 6) 166 Fed. 271, 273, 92 C. C. A. 189; L. E. & W. R. R. Co. v. Mackey, 53 Ohio St. 370, 41 N. E. 980, 29 L. R. A. 757, 53 Am. St. Rep. 641. And it was not negligence per se for decedent to voluntarily risk her own life in attempting to rescue her child from the impending danger. Pennsylvania Co. v. Langendorf, 48 Ohio St. 316, 28 N. E. 172, 13 L. R. A. 190, 29 Am. St. Rep. 553.

[3] Notwithstanding the pathway in question was not a public highway, but was a mere private way, yet under the case stated in the petition the public was licensed to use it in crossing the tracks, and a duty rested upon the defendant company to exercise reasonable care to avoid injury to those whose presence there might reasonably be anticipated. Felton v. Aubrey (C. C. A. 6) 74 Fed. 350, 360, 20 C. C. A. 436; Tutt v. Railroad Co. (C. C. A. 6) 104 Fed. 741, 743, 44 C. C. A. 320. This obligation has perhaps been most frequently applied in favor of those injured by the movement of a train or in switching operations while attempting to cross a track at the moment unobstructed, as in Felton v. Aubrey, supra; Tutt v. Railroad Co., supra; Trivette v. Railway Co. (C. C. A. 6) 212 Fed. 641, 646, 129 C. C. A. 177; Southern Ry. Co. v. Smith (C. C. A. 6) 214 Fed. 942, 946, 131 C. C. A. 238. Such cases proceed on the theory that the presence of travelers on the crossing is reasonably to be anticipated. As said by Mr. Justice Day, in Tutt v. Railroad Co., supra, 104 Fed. 743, 44 C. C. A. 322:

"The reason of the doctrine being that where the company has the exclusive right to the use of its tracks, and has neither impliedly nor expressly

licensed persons to be there, it has no reason to expect them, and consequently is under no obligation to be on the lookout, or to avoid injury to such persons. But where they may be expected to be, and where an implied license has arisen from the conduct of the company, it is bound to use care commensurate with the circumstances to avoid injury to such persons."

We have also said that, where a train is cut in two to enable the public to cross the track, due warning is required before closing the gap. Southern Ry. v. Smith, supra, 214 Fed. at page 945, 131 C. C. A. 238.

It may be assumed that the petition would not be demurrable, had it contained an allegation that the defendant's employés knew of the child's presence unattended and close to the track, or that it was likely to attempt to pass under the cars (Henderson v. Railroad Co., 52 Minn. 479, 55 N. W. 53), or that defendant's employés had reason to believe that decedent had gone under the cars. But there is an entire absence of such allegation.

It may also be conceded, for the purposes of this opinion, but without so deciding, that, had the petition asserted that people were in the habit, to the knowledge of the railroad company, of passing along the pathway and through or under trains standing across it, a cause of action would be stated upon the theory that the presence of a traveler in such perilous position might reasonably be anticipated, as licensed by defendant. See, in this connection, McCarthy v. Railway (C. C. A. 2) 240 Fed. 602, at page 609, 153 C. C. A. 406 (foot). But, so far as shown by the petition, the defendant had no reason to apprehend that any one would attempt to pass under the train, unless from the mere fact that a much-used pathway crossed the right of way where the train was standing. The nearest approach to such allegation is in the statement that the defendant "knew or in the exercise of ordinary care should have known the use to which the pathway was put, and that men, women, and children used said pathway." This obviously refers only to the general use of the crossing, not to its use when occupied by a train. No authorities are cited, and we have found none, which sustain the proposition that a license to use the pathway over the tracks when not occupied by a train includes a license to cross when the pathway was so occupied, or, otherwise stated, that defendant was bound to assume, from the mere fact that the pathway over the tracks was in common use, that travelers would attempt to pass under the standing cars, or that in the absence of reason to so expect, or to believe that such attempt was being made, defendant was obliged to provide against the possibility of accident by giving notice that the train was about to be moved, or by having employés on the watch to warn against or prevent attempts to so cross. In our opinion the rule is to the contrary. Central R. R., etc., Co. v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634; Papich v. Railroad Co. (Iowa) 167 N. W. 686. We should not be understood as committing ourselves to all that is said in the case last cited on the subject of the railroad's duty and liability.

[4] The petition does not state a case of "attractive nuisance" or of invitation, as illustrated by Railroad Co. v. Stout, 17 Wall. 657, 21

L. Ed. 745; Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N. E. 66; Escanaba Co. v. O'Donnell (C. C. A. 6) 212 Fed. 648, 129 C. C. A. 184.

[5] It follows from these views that the demurrer was rightly sustained.

[6, 7] The court, however, not merely sustained the demurrer, but dismissed the case. In this we think there was error. Under well-established practice, plaintiff was entitled to an opportunity to amend (which does not appear to have been given), unless it is clear that a good cause of action cannot be stated by amendment. The learned District Judge thought such was obviously the case. We think the situation disclosed by the petition does not warrant such conclusive assumption, but that it is reasonably conceivable that the circumstances attending the accident were such as—consistently with the allegations of the present petition—would enable the statement of a case of liability. Plaintiff's counsel asserts here a desire to amend. As the record does not show that plaintiff was given opportunity to do so, the absence of specific assignment for failure to give such permission, as distinguished from an assignment of error in entering judgment for defendant, should not prevent review under our rule 11 (202 Fed. viii, 118 C. C. A. viii).

The judgment of the District Court is reversed, with directions to give plaintiff opportunity to amend his petition.

(257 Fed. 497)

In re LAKE CHELAN LAND CO.

OLIVE v. TYLER.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3223.

1. CORPORATIONS ⟹316(1)—TRANSACTIONS WITH DIRECTORS—LOANS—VALIDITY.

   An insolvent corporation, in need of funds and ready cash, may borrow the amount needed from a director or other officer of the corporation, and secure it by lien on its property or transfer of its assets.

2. BANKRUPTCY ⟹163—LIENS—VALIDITY.

   Where the directors of an insolvent corporation, in good faith and with the intention of saving the business, borrowed money from a director and a stockholder to meet the most pressing obligations, and executed a real and chattel mortgage on all of the corporate assets to secure the same, *held*, the transaction being one in good faith, that the mortgage could not, on the corporation's subsequent bankruptcy, be questioned on the ground that it was preferential and to an officer of the corporation.

3. BANKRUPTCY ⟹467—APPEAL—FINDINGS.

   Findings of the referee, affirmed by the District Court, and supported, will not be set aside by the Circuit Court of Appeals.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

In the matter of the Lake Chelan Land Company, a corporation, bankrupt. The mortgage claim of C. B. Tyler was allowed by the

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

referee and established as a preferred claim, and from an order denying the petition of Walter M. Olive, as trustee in bankruptcy, for review, and confirming the order of the referee, the trustee appeals. Affirmed.

This is an appeal by the trustee of the bankrupt corporation from an order of the District Court denying the trustee's petition for a review, and confirming the order of the referee, sustaining the mortgage claim of one Tyler; Tyler having offered proof of a secured claim, which claim was established and allowed as a preferred claim by the bankruptcy court over the objections of creditors. The substance of the referee's findings, as adopted by the District Court, makes this case:

The bankrupt corporation organized in 1909, with a capital of $500,000, to hold, develop, and sell a large tract of land. There were a small number of stockholders, and large sums of money were raised by pro rata assessments upon the stockholders. The company gave its notes for such advances of money, and upon unsecured obligations about $340,000 were borrowed. In addition to these obligations, the company owed debts for money borrowed upon its notes, which were secured by pledges of certain purchase-money contracts, covering lands that the corporation had sold, in the sum of $110,000, $50,000 of which notes were held by the National Bank of Commerce of Seattle, and $60,000 held by certain individuals. In June, 1916, these secured notes were past due, and the bank notified the corporation that payment must be made by January 1, 1917.

About that time one Furey became a stockholder and was elected president of the corporation. He held one-fourth of the total amount of stock and one-fourth ($85,000) of the stockholders' notes that had been issued. After demand was made for payment, Furey assured the stockholders that he could raise the money in the Eastern cities to meet the obligations of the company, but after efforts he failed to do so. To avert the then apparent ruin of the corporation, unless it could borrow money, two stockholders, Green and Tyler, were asked, and agreed, to furnish the needed money to meet the obligations, which by that time amounted to about $116,000, due upon secured notes and other debts, exclusive of notes due to stockholders. After the matter was discussed among the stockholders, it was decided that the corporation should borrow $120,000 from Green and Tyler in order to pay the obligations and to carry the company along for a few months, during which time Furey hoped that he could borrow enough money to save the business. His general purpose was to realize funds through the sale of bonds of an irrigation district to be organized, the district to take over a water system in which the corporation had an interest.

At that time the shares were owned as follows: Tyler had three-eighths, Green one-fourth, Furey one-fourth, and Swalwell one-eighth. There were some shares held by qualifying persons. On December 14, 1916, a stockholders' meeting was held, at which all of the stockholders, seven in number, were present or represented, and the corporation, by unanimous vote, was authorized to borrow $120,000 of Green and Tyler, and to secure the obligation by a mortgage upon all of the property and assets of the corporation. Upon the same day the trustees met and authorized the mortgage, and with provision therein that all of the income should be applied upon the mortgage. The mortgage was duly executed, and among other things provided that, while the company should continue in business and make sales, the income from sales should be applied in the reduction of the mortgage debt. In carrying out this plan, the $120,000 was paid to the company by Green and Tyler, and the company issued 12 notes, of $10,000 each, payable to bearer, dated December 30, 1916, due on or before one year after date, and executed a real and chattel mortgage, dated December 30, 1916, upon all of its property, which mortgage was recorded January 22, 1917. The notes owned by Green were afterwards transferred to Tyler. The secured obligations were paid, as also were the other obligations, except what was due upon stockholders' notes, and any sums due as assessments for irrigation

purposes upon the cultivated lands of the company, which, under the terms of contracts between the company and the water company, were first liens upon the lands to which the water was furnished. The collateral to secure the old notes was delivered to Furey, president, and by using the $4,000 over the sums paid out on secured claims the corporation ran along with the hope of continuing. About August, 1917, 550 acres of the lands of the corporation, valued at about $93,000, were transferred by Furey, as president, to one Brown. Furey turned over to Brown the stockholders' note for $84,500, with interest, which was owned by Furey, to enable Brown to turn the note into the company as a payment for the 550 acres of land.

Tyler, as the holder of all the notes, immediately brought foreclosure proceedings in the United States District Court, alleging that the company had not paid the interest on the mortgage, or taxes on its property. Very soon thereafter, September 13, 1917, a voluntary proceeding in bankruptcy was initiated by the secretary by direction of a majority of the trustees. Afterwards, at a stockholders' meeting held October 4, 1917, the action of the trustees in directing petition for bankruptcy was fully ratified. Furey protested.

After the trustee in bankruptcy was elected, and after the mortgage given to Tyler had been questioned by Furey and others, an order upon Tyler was issued to show cause why the property should not be held by the trustee in bankruptcy free and clear of the lien of his mortgage. Tyler appeared and propounded his claim. Objections were made by certain creditors and by the water company; the contention of the creditors being that the mortgage was preferential, and not given for a valuable consideration, while the water company claimed rights under its contract as superior to Tyler's mortgage.

It was also found that at the time the loan in question was made, and the mortgage was given to secure the same, the corporation was insolvent; that the mortgage was given to secure the money then loaned to the corporation, and was not for any antecedent indebtedness; that Green was an officer of the corporation at the time the loan was made, and knew of its insolvent condition; that, after the disbursement of the fund raised by the loan, the debts remaining unpaid were not pressing for payment, and that the stockholders and directors were fully advised of the purpose of the loan, the apparent necessity therefor, and of the affairs and financial condition of the company; and that the corporation continued its usual course and conduct of business for approximately nine months after the loan, when the conveyance of the 500 acres heretofore referred to was made.

Carroll B. Graves, of Seattle, Wash., and R. S. Ludington, of Wenatchee, Wash., for appellant.

Ira Bronson, J. S. Robinson, and H. B. Jones, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1, 2] The contention of the trustee is that majority directors and stockholders of an insolvent corporation, having knowledge of insolvency, cannot take a mortgage on all of the property, assets, and income of the corporation, and thus prefer themselves; that the mortgage in question was made by the directors and officers with intent to prefer their claims; that the mortgage was used by the directors and officers to secure themselves upon a prior obligation, which they had assumed with the Bank of Commerce; that Tyler could not propound and prove the mortgage and secured notes as the real owner of the claims, because one Backus owned $40,000 worth of notes, and Green owned $20,000 worth thereof, and that these interests had not,

in any manner, been transferred to Tyler; and that Green, one of the mortgagees, had never assigned his interest in the mortgage.

The question of the condition of the corporation and of the good faith of the directors and officers at and about the time of the transactions under investigation being most important, we have carefully considered the whole record, with the principle in mind that the mortgagees were bound by those rules of conscience and fairness which courts of equity have laid down in disposing of transactions, where directors of corporations are dealing with the subject-matters of their trust and with the party whose interests are within their care. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328.

It is evident that the loan to the corporation was made after Tyler and Green were urged to lend the money and after the failure of earnest efforts to obtain money from outside sources. It was evident that the corporation would fail unless it could procure money to meet its pressing obligations, but it was believed by stockholders and directors that if funds could be borrowed operation could be continued, and the immediate necessities could be met, and the company could work through its difficulties. Two courses seemed open: The directors could stop business and close up the affairs, or, in good faith, they could lend it money, thus enabling business to go on for the apparent benefit of the corporation. The directors and stockholders chose the latter plan, and, while disaster eventually came, it has been found that good faith on the part of the directors characterized their conduct. We find no foundation for the argument that the money loaned by Green and Tyler was to enable the company to pay its antecedent debt. The advances were present ones, to be used by the corporation to pay its pressing debts, and to enable it to extricate itself from immediate embarrassment, and in the expectation that it could continue in business and meet its obligations. Under such circumstances the mortgage was not invalid, though made to an officer of the corporation. 7 R. C. L. § 775; Sanford Tool Co. v. Howe et al., 157 U. S. 312, 16 Sup. Ct. 621, 39 L. Ed. 713.

Strohl v. Seattle Nat. Bank, 25 Wash. 28, 64 Pac. 916, cited by appellant, was a case where the security was given for an antecedent debt. The decision is not authority for holding that a mortgage given by an insolvent corporation for a present advance is not valid. It is referred to in 10 Cyc. 1261, as sustaining the validity of such mortgages, and Thompson on Corporations, § 6200, makes the following comment upon it and other like cases:

> "It must be noted that the cases make a very clear distinction between the fact of securing a director for money loaned or advanced to a corporation and the fact of giving the director preference by way of security for any claim that he may have against the corporation. There is no reason why even an insolvent corporation, in need of funds and ready cash, may not borrow the amount needed from a director or other officer of the corporation and secure him by a lien on its property or a transfer of its assets."

See, also, Twin-Lick Oil Co. v. Marbury, supra; Illinois Steel Co. v. O'Donnell, 156 Ill. 624, 41 N. E. 185, 31 L. R. A. 265, 47 Am. St. Rep. 245; Cook on Corporations, § 692. Of course, if there had

been fraud or action by the mortgagees to secure an undue advantage to themselves, by endeavoring to acquire all of the assets of the corporation under mortgage, a different question would be presented. But the findings are against such conclusions. It is true that a prior indebtedness of $110,000 existed and was secured by contracts for sales, and that the new mortgage by the corporation was for $120,000 and covered the land, and it may be that the security was excessive. However, when it is considered that the property would have to be sold on judicial sale, that the bidding would be open to all, and that a sale would be subject to redemption, and that the mortgagees would only be entitled to receive the amount of the mortgage indebtedness, it is not to be held that undue advantage was being taken by the mortgagees in taking all the assets as security.

[3] As to all other material matters, it is sufficient to say that the findings of the referee, affirmed by the District Court, are supported, and will not be set aside in this court. In re Dorr, 196 Fed. 292, 116 C. C. A. 112.

We think that the lower court was right in holding the mortgage to be valid. The court went no farther, and by its decision did not adjudicate questions of the claim of the water company to a superior lien.

The order appealed from is affirmed.

THE KINAU.

(257 Fed. 501)

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3194.

SHIPPING ⟹166(4)—INJURIES TO PASSENGER—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence *held* to show that the steamship company, into the hold of whose vessel libelant, a passenger, fell, was guilty of negligence, so that libelant was entitled to recover damages for his injuries, despite libelant's testimony adverse to himself; he having been rendered at least temporarily insane by his fall.

Appeal from the District Court of the United States for the Territory of Hawaii; Horace W. Vaughan, Judge.

Libel by Natalio Peneyra, an insane person, by Adriano Borha, his guardian ad litem, against the American steamship Kinau and the Inter-Island Steam Navigation Company, Limited, bailee, claimant, and owner. From the decree, libelant appeals. Reversed, and cause remanded, with instructions to enter decree for libelant.

Natalio Peneyra, described as an insane person by his guardian ad litem, filed a libel against the steamship Kinau to recover damages for personal injuries sustained as a passenger on the steamship, which was engaged in carrying passengers for hire from Honolulu to a port on the island of Kauai. The libel alleged that on December 9, 1917, shortly after taking passage on the steamship, the second officer of the steamship ordered Peneyra to go into the steerage, and in a rough and improper manner shoved him over towards an open, unguarded, and unlighted hatchway, and he, without fault or negligence on

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his part, stepped into said hatchway and fell into the hold of the steamship, and sustained serious and permanent wounds and injuries, to such an extent that he lost his reason and became insane, and that he was declared insane by a court of competent jurisdiction in the month of December, 1917, after he had received said injuries. The appellee in its answer admitted that the appellant, while on the deck of said vessel, fell into an open hatchway in the hold of said vessel, a distance of about eight feet, and struck his head on the floor or some object in said hold, and sustained some injury, the nature and extent whereof it was ignorant.

The court below made no findings of fact, but in an opinion reviewed the statements of Peneyra given in open court three days after the conclusion of the testimony offered on behalf of the parties. The court expressed the opinion that the evidence proved that Peneyra was then sane, and that the only evidence that he ever was insane was the adjudication upon which he was committed to the asylum. Treating the statements of Peneyra as declarations against his interest, the court denied his right to recover. The testimony so taken in open court was all in answer to questions by the judge, and it consisted mainly in Peneyra's answer of "Yes" to leading questions. The record shows the following:

"Q. Did you have a ticket at the time you got on board? A. I wasn't given yet a ticket. Q. Did you take your little girl on the boat with you? A. Yes. Q. Did you walk up on the upper deck? A. We did. Q. Did you leave the little girl on the upper deck? A. Yes. Q. And you went down to see about your baggage? A. Yes. Q. That's what you went down for? A. Yes. Q. Did you remember when you fell on the steamer? A. I did. Q. You remember falling? A. Yes. Q. How came you to fall? A. I was dizzy. Q. Were you facing towards the hatch when you fell? A. Yes. Q. You were facing the hatch? A. Yes. Q. Did you fall forward through the hold or hatch? A. Yes. Q. Because you were dizzy? A. Yes. Q. Did you fall backwards through it? A. No. Q. When you fell, do you remember them picking you up? A. Yes. Q. You remember them picking you up after you fell? A. I do. Q. You remember them picking you up out of the hatch and taking you back on the shore? A. Yes. Q. You remember that? A. Yes. Q. Did you know at that time they were taking you back to the shore? A. Yes. Q. Did you have them take your little girl with you? A. Yes. Q. Was the little girl taken back on shore? A. Yes. Q. How did you get back from the ship to the shore? A. The boss of the steamer ordered me to go ashore. Q. Are you crazy? A. No. Q. Have you been crazy? A. No. Q. Did you know that you were out here at the asylum? A. Yes. Q. What were you doing out at the asylum? A. I was out there simply sitting around. Q. Did you know what you were doing there? A. I was doing nothing. The American told me to go out to work, but I worked only a month. Q. When you fell on the ship, were you squatting down or were you standing up? A. At that time I was standing up; when I got dizzy, I stooped down. Q. Was the hatch open? A. Yes. Q. Was there a rope around it? A. Yes. Q. How many sides—was the rope around all four sides of the hatch? A. Yes; the rope was around all four sides. Q. When you fell in? A. Yes."

George A. Davis and J. J. Banks, both of Honolulu, T. H., for appellant.

L. J. Warren and Smith, Warren & Whitney, all of Honolulu, T. H., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). We are of the opinion that the court below erred in wholly disregarding the testimony against the appellee, and accepting the statements of Peneyra as declarations against interest, and as conclusive of the merits of the controversy. Peneyra's statements suggest their own

improbability. According to him, a man in good health, not intoxicated, becomes dizzy, stoops toward the floor, and then pitches face first into an open hatch, notwithstanding that a rope stretched 30 inches above the deck extends around the four sides of the hatch for his protection. Some portions of the statements are proven to be false by the undisputed facts in the case. Thus he stated that he had not purchased a ticket. The appellee admits that he had purchased a first-class ticket, and Aki testified that he saw the ticket in his hand. Also he stated that the rope was stretched around the four sides of the hatch when he fell in. The first officer testified that the rope was down on one side. The evidence is that, when Peneyra fell, he received a severe injury upon the head rendering him unconscious, that he was taken to a hospital, where he remained a week, showing insanity by his acts, and that he was thereupon adjudged insane and sent to an insane asylum, in which he remained four months, and from which he had been discharged only two days before his statement was taken in court. There was the evidence of one witness that while in the asylum Peneyra had no recollection concerning his fall, and denied that he had fallen while on the steamship. One of the physicians who examined Peneyra at the time of his discharge testified that he doubted his complete restoration to sanity for the reason that he found his memory "pretty hazy" as to what had occurred on the steamship.

The evidence which we think should countervail Peneyra's statements in court is the following: Peneyra was one of a group of passengers standing in the between-decks, where the boatswain was in charge. It is shown, and it is not disputed, that immediately after the accident the first officer asked the boatswain how it happened, and that the latter said, "I told them to get away, but this fellow fell down." The boatswain testified that he told the deck passengers, "Clear away!" and he motioned with his hand, and "while I was making these motions of separation to the deck passengers, this man in question fell into the hatch, and I immediately went to help him." Aki, a fellow passenger, testified that it was dark in the between-decks, that the hatch was open, and that Peneyra was there, but that he did not see him fall; that immediately after he fell the first officer said it was the boatswain's fault in not covering the hatch up. Cabache, also a fellow passenger, was present at the time when Peneyra fell, but did not see him fall. He testified that he also heard the first officer say it was the boatswain's fault. All who testified to Peneyra's condition said that his scalp was cut and bleeding and that he was unconscious when taken from the hold.

Sanchez is the only witness who testified that he saw Peneyra fall. He was a fellow passenger. He testified that the boatswain told the group of passengers to move back, because they were loading crates of chickens; that Peneyra was standing about six feet from the hatch, with his back toward the hatch; and that the boatswain raised his hands saying "Move back, you fellows!" and that Peneyra moved back and fell into the hatch. The appellee points to alleged discrepancies in the testimony of Sanchez, upon which it contends that

his testimony should be wholly disregarded. We have carefully considered that contention, and we find nothing substantial in it. One alleged discrepancy is that Sanchez testified at one time that Peneyra had his bag with him, and at another time he testified that Peneyra had no baggage when he came aboard. This apparent discrepancy disappears when Aki's testimony is considered. It indicates that Peneyra's baggage had been sent on board ahead of him, and that when he got aboard he was looking around for his baggage, and that he went from the upper deck to the between-decks to search for it. Sanchez may have been in error in testifying that Peneyra had his little girl by the hand at the time when he fell, but he had seen him holding his girl's hand when he came on board the ship, and he probably thought that the little girl was still with him when he fell. Such discrepancies as these have not the effect to discredit a witness.

It is not denied that Sanchez was standing near the boatswain at the time when the order to move back was given. He testified, and it is not disputed, that he translated it to the other Filipinos in aid of the boatswain's directions and at his request, and that while he was still so engaged Peneyra, who stood near the hatch, stepped back and fell in. If there is any testimony here which should be scrutinized on account of interest or motive to color it, it is not that of the fellow passengers of Peneyra, but that of the officers of the appellee. They, however, dispute none of the testimony as to the essential incidents above adverted to. The accident occurred at about the time of sunset. The electric lights had not been lit in the between-decks. Witnesses for the appellee, all of whom were its employés, testified that it was light. One of them testified that objects were plainly discernible, except in one portion at some distance from the hatch. The witnesses for the appellant testified that the light was dim. We reach the conclusion that the light was not sufficient to reveal clearly the danger of the open hatch.

It seems evident that, if Peneyra had recovered his sanity at the time when he made his statements in court, his memory had been so impaired, by the blow upon the head which caused his insanity, that little or no reliance can be placed in it. If, indeed, he had a spell of dizziness, it is very remarkable that it occurred at the very moment when he stepped back in compliance with the boatswain's order. The evidence in the case convinces us that the appellee was guilty of negligence, and that the appellant is entitled to recover damages therefor in the sum of $600.

The decree is reversed, and the cause is remanded to the court below, with instructions to enter a decree for the appellant in the sum of $600 and costs.

(257 Fed. 505)

HARDWICK v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3240.

1. PERJURY ⟹9(2)—SELECTIVE SERVICE REGULATIONS—AUTHORITY TO ADMINISTER OATH.

Under the Selective Service Regulations, published November 8, 1917, pages 7 to 14, associate member of the legal advisory draft board of a county in California *held* to have had authority to administer to a registrant an oath on the occasion of such registrant's verifying his questionnaire as to the details of persons dependent upon him, as a wife.

2. PERJURY ⟹19(2)—INDICTMENT—FRAUD IN OBTAINING EXEMPTION FROM SELECTIVE DRAFT.

Where the indictment, charging defendant with having unlawfully, improperly, and fraudulently endeavored to obtain the allowance of his application for exemption and discharge from the selective service draft on the ground that he had a dependent wife, charged that he willfully and falsely stated in the affidavit to his questionnaire that he had a wife dependent on his labor for support, etc., such indictment was not defective because failing to aver that the wife was mainly dependent for support on defendant's labor.

3. CRIMINAL LAW ⟹97(1)—JURISDICTION OF COURT—PERJURY IN OBTAINING EXEMPTION UNDER SELECTIVE SERVICE ACT.

The United States District Court in California had jurisdiction to try a prosecution for having unlawfully, improperly, and fraudulently endeavored to obtain allowance of an application for exemption and discharge from the selective service draft on the ground defendant had a wife dependent on his labor for support, where the indictment alleged that the affidavit involved was prepared and sworn to in California, though it charged that defendant registered in the state of Washington.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Noah F. Hardwick was convicted of perjury by having unlawfully, improperly, and fraudulently endeavored to obtain allowance of his application for exemption and discharge from the selective service draft, and brings error. Affirmed.

George D. Collins, Jr., of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and Chauncey F. Tramutolo, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The defendant, who was represented by counsel, pleaded guilty and was sentenced to imprisonment under an indictment which, after certain preliminaries not now material, charged that on June 5, 1917, at Walla Walla, Wash., he registered under the act to authorize the President to increase temporarily the military establishment of the United States (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, § 2044a et seq.]); that he was called for military service in the Northern district of California, and on the 15th of January, 1918, he prepared and filed with the local board for the county

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of Walla Walla, Wash., in support of a claim made by him for exemption and discharge from selective service draft, with the intent of deceiving the officers of the local board for said county in Washington, and "of unlawfully, improperly, and fraudulently endeavoring to obtain the allowance of his application for exemption and discharge" from the selective service draft on the ground that he had a wife dependent upon his labor for support, a certain affidavit, subscribed and sworn to before George M. Hench, associate member of the legal advisory board of San Joaquin county, Cal., "an officer competent and authorized by the laws of the United States of America to administer oaths, and to administer the oath to defendant to testify and tell the truth"; that in the affidavit mentioned "it was material and necessary to set forth whether or not the said defendant had any person or persons dependent upon his labor for support," and the defendant, so having taken the oath as aforesaid, "* * * did then and there willfully, unlawfully, feloniously, and falsely, intentionally and contrary to such oath," state that he, the said defendant, did have a wife named Gynetha G. Hardwick, dependent upon his labor for support, "whereas, the defendant then and there well knew that said Gynetha G. Hardwick was not at that time, nor at all, his wife, and dependent upon his labor for support, and that said false statement was and is a material matter and a material part of said affidavit."

In the lower court there was no challenge as to the sufficiency of the indictment. By writ of error defendant here presents the question whether the indictment states an offense.

Perjury is defined by section 125 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1111 [Comp. St. § 10295]) as follows:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years."

[1] It is said that under the Selective Service Regulations, published November 8, 1917, pages 7 to 14, the associate member of the legal advisory board of San Joaquin county, Cal., had no authority to administer the oath on January 15, 1918. But the regulations prescribed that the oath required could be administered (section 10, paragraph 4) "by any person designated to act in the capacity of legal aid or adviser to registrants." Under section 30, page 14, of the Regulations:

"The Governor shall constitute legal advisory boards in such numbers and within such districts that there shall be convenient to every registrant who is to appear before a local or district board within the state, a legal advisory board. * * * The Governor shall call upon all members of the bar within the state, and if necessary, upon competent laymen, to offer their services to such legal advisory boards for the purpose of being present at the headquarters of the local boards and rendering aid and advice to registrants. Such persons

shall be known as associate members and no formal appointment by the President shall be necessary."

The President was authorized to utilize the services of any or all officers or agents of the several states and subdivisions thereof in the execution of the act, and all persons designated or appointed under the regulations prescribed by the President, whether such appointments were made by the President himself, or by the Governor or other officer of any state, to perform any duty in the execution of the act, were required to perform such duty as the President should order or direct, and all persons so designated or appointed were given full authority for all acts done by them in the execution of the act by the direction of the President. Section 6 of the act (Comp. St. 1918, § 2044f). By rule (section 27) the Governors were charged with general supervision over all matters arising in the execution of the selective draft within their states, and it was also provided:

"The determination of exemptions and deferred classifications is within the exclusive jurisdiction of local and district boards, subject only to review by the President, but all other functions and duties of boards, departments, officers, agents and persons within the state, * * * designated or detailed under authority of the selective service law, shall be under the direction and supervision of the Governor."

By section 28, the Governors were charged with the organization of the legal advisory boards throughout their states. By section 30, the Governor—

"shall constitute legal advisory boards in such numbers and within such districts that there shall be convenient to every registrant who is to appear before a local or district board within the state, a legal advisory board to which such registrant may apply for all necessary advice and assistance in preparing claims, questionnaires or any other papers required by these regulations to be submitted by a registrant."

The Governor was authorized to nominate for appointment by the President lawyers to be permanent members of such boards "to take charge of this work within each such district and to be held responsible that there shall always be a competent force of lawyers or laymen available to such registrants at any time during which the local or district boards within such district are open for business"; also to call upon the members of the bar to offer their services to such legal advisory boards for the purpose of being present at the headquarters of the local board and of rendering aid and advice to registrants. "Such persons shall be known as associate members and no formal appointment by the President shall be necessary." Section 45 declares that legal advisory boards have been provided for; that they are composed of disinterested lawyers, with associate members to be present at all times during which local boards are open for the transaction of business, with a view to advising and assisting registrants to make full and truthful answers to the questionnaire and to aid generally in the just administration of the law and regulations. By section 2 it was provided that certain sections and parts of the rules and regulations should become effective at noon on November 20, 1917, and thereupon supersede all pre-existing rules and regulations relating to the same subject-

matter, namely, sections 9 to 13, inclusive. Enough has been stated to make it clear that section 10, hereinbefore quoted, was in effect on November 20, 1917, and therefore obtained at the time that the oath described in the indictment herein was administered to the defendant.

By section 91, which pertains to the questionnaire, grounds for exemption are dealt with; the rule directing that the questionnaire shall contain, "as an integral part thereof, affidavits in support of claims for exemption or deferred classification in certain cases hereinafter specified." Among the definitions we find this provision:

(k) "The term 'deferred classification' is equivalent to discharge or exemption from draft, whether permanent, temporary, conditional or unconditional."

Our attention is not called to any section of the Selective Draft Law which forbids one from registering in one locality and then making affidavit in support of a claim for exemption in another place. The whole scheme of the law appears to have been to facilitate registration, and in doing so to allow one whose duty it was to register to fulfill his obligation at the place he happened to be when the law required the duty to be performed.

Inasmuch as the regulations prescribed by the President for the determination of the status of a registrant require a showing for exemption to be made by affidavit, and inasmuch as the regulations have the force and effect of law, we think it appears that the person who took the oath was authorized by law to administer it.

[2, 3] Defendant urges that the averment that the defendant well knew that the woman named in the indictment "was not at that time, nor at all, his wife, nor dependent upon his labor for her support," was fatally defective, because of the omission of an averment that the wife was *mainly* dependent for support upon the labor of the accused. But, as the charge is that defendant willfully falsely stated in the affidavit that he had a wife dependent upon his labor for support, whereas he well knew that the woman named was not then, or at all, his wife, and dependent upon his labor for her support, defendant was sufficiently informed and could not possibly have been misled or prejudiced. The materiality of the false statement and affidavit is too apparent to require comment.

It is said that the United States District Court in California was without jurisdiction, because the indictment shows that the offense, if any, was committed in the state of Washington, and not of California. The fact being alleged that the affidavit involved was prepared and sworn to in San Joaquin county, Cal., plainly there was jurisdiction in the lower court.

This disposes of the principal points urged. We have considered the others argued in the brief, and find none well founded.

The judgment is affirmed.

(257 Fed. 509)

WHITESIDE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3263.

1. PERJURY ⟹9(2)—FALSE AFFIDAVIT TO SELECTIVE SERVICE QUESTIONNAIRE —AUTHORIZATION OF OATH.

Under Selective Service Regulations 1917, §§ 91, 94, 95, a registrant who swore to the affidavit verifying his questionnaire, which falsely stated that he had a wife dependent on him for support, committed perjury, despite his claim that there is no statute authorizing such an oath, and no authorization by the regulations.

2. PERJURY ⟹19(2)—INDICTMENT—IDENTITY OF PERSON CHARGED.

Indictment for perjury by having sworn falsely that defendant, a registrant under the Selective Service Act (Comp. St. 1918, § 2044a et seq.), had a wife dependent on him for support, *held* sufficient in its charge that defendant was the person who subscribed and took the affidavit.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

William Lloyd Whiteside was convicted of perjury by making a false affidavit, under the selective service draft, that he had a wife dependent on him for support, and brings error. Affirmed.

George D. Collins, Jr., of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and Chauncey F. Tramutolo, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Whiteside was indicted for having violated the perjury statute of the United States. Section 125 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1111 [Comp. St. § 10295]). As the statute has been quoted in our opinion in Hardwick v. United States, 257 Fed. 505, 168 C. C. A. 513, it need not be set forth in full.

It is charged that on January 7, 1918, at San Francisco, Cal., defendant, who had been duly registered under Act May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, § 2044a et seq.), entitled "An act to authorize the President to increase temporarily the military establishment of the United States," was subject to military service, the serial number of the registration card of the defendant having been drawn at Washington, D. C.; that defendant on the day mentioned filed with the local board for division No. 10, San Francisco, in support of a claim for exemption and discharge from selective draft and with the intent of deceiving the officers of the local board and fraudulently endeavoring to obtain allowance of his application for exemption on the ground that he had a wife dependent upon his labor for support, a certain affidavit; that the affidavit was subscribed and sworn to before William Klein, associate member of the legal advisory board of San Francisco, an officer authorized by law to administer oaths, and that the said William Klein, as such associate member, administered the oath to de-

fendant; that it was material and necessary to set forth whether defendant had any person dependent upon his labor for support, and that defendant, having taken the oath to testify truly as to all matters referred to in the affidavit, did willfully, feloniously, and falsely, knowingly and contrary to the oath, state in substance and effect that he did have a wife, named Gertie J. Whiteside, dependent upon his labor for support, whereas, in truth and in fact, defendant at that time and place then and there well knew that the said Gertie J. Whiteside was not then his wife, and was not dependent upon the labor of defendant for support; and that said false statement was and is a material matter and a material part of the affidavit. No question of the sufficiency of the indictment was raised in the District Court.

Defendant was tried before a jury, convicted, and sentenced to prison. By writ of error he presents the question whether the indictment charges perjury.

[1] The point that there is no statute authorizing the oath referred to in the indictment and no authorization by the Selective Service Regulations is, in part, covered by what we have said in the case of Hardwick v. United States, 257 Fed. 505, 168 C. C. A. 513. That an affidavit was required from the registrant, who claimed exemption or discharge, cannot be well disputed. The registrant was obliged to file a questionnaire, of which the affidavit was an integral part. The regulations are that the questionnaire—

"shall also contain, as an integral part thereof, affidavits in support of claims for exemption or deferred classification in certain cases hereinafter specified." Sections 91, 94, and 95, Selective Service Regulations 1917.

[2] It is said that it does not appear who subscribed to the affidavit taken by the defendant. But it is alleged that the affidavit was subscribed and sworn to, and that the associate member of the legal advisory board administered the oath to the defendant, and that in the affidavit hereinbefore referred to defendant, having taken the oath to testify to matters referred to in the affidavit, falsely and knowingly stated, in effect, that he had a wife who was dependent upon his labor for support. This makes it perfectly clear that the defendant was the person charged with having subscribed and taken the affidavit.

We are satisfied that the defendant was legally charged with perjury and that the judgment against him cannot be disturbed. Noah v. United States, 128 Fed. 270, 62 C. C. A. 618.

Affirmed.

(257 Fed. 511)

ALASKA ANTHRACITE R. CO. v. MOLLER.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3265.

1. CONTINUANCE ⟹26(4)—ABSENCE OF WITNESS—DILIGENCE—DISCRETION OF COURT—STATUTE.

In a railroad servant's action for injuries, denial of the road's motion for continuance to enable it to secure the testimony of a witness, whom a counter affidavit showed to be an employé of defendant company, *held* within the discretion of the court, under Comp. Laws Alaska 1913, § 1001, in view of showing as to diligence.

2. TRIAL ⟹253(4)—INSTRUCTIONS—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—IGNORING ISSUES.

In a railroad servant's action for injuries, the road's requested instructions on assumption of risk and contributory negligence *held* properly refused, as not fitting the case, but ignoring an allegation of the complaint.

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

Action by Arnold Moller against the Alaska Anthracite Railroad Company. To review a judgment for plaintiff, defendant brings error. Affirmed.

R. M. Jones, of Seattle, Wash., Lyons & Ritchie, of Valdez, Alaska, and Lyons & Orton, of Seattle, Wash., for plaintiff in error.

Donohoe & Dimond, of Valdez, Alaska, and R. F. Lewis, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The defendant in error, Moller, a laborer with a track-laying gang, was injured while returning from work upon a work train belonging to the railroad company. The car upon which Moller rode was a "home-made affair," of light weight, and with a standard flat car behind was being pushed by the engine. The track was new; the rails having been laid but a week before, without artificial grade. The train was running about 20 miles an hour. There was a sag, and as the car was pushed up it jumped the track, the cars piled up, and Moller was hurt. The defendant corporation denied allegations of excessive speed, denied any negligence, and pleaded assumption of risk and contributory negligence. Defendant rested upon a motion for nonsuit. The motion was overruled, the jury was instructed, and verdict rendered for plaintiff. Writ of error was brought.

[1] The railroad company contends that the court erred in denying its motion for a postponement of the trial of the case. Our inquiry is solely whether or not there was an abuse of judicial discretion. The affidavit with the motion for a continuance was made on May 27, 1918, by one of the attorneys for the railroad company. It set forth that since the institution of the action, December, 1917, none of the officers of the company had been in Alaska; that affiant was informed by Mr. Lyons, his co-counsel in Seattle, that since January, 1918, all of the offi-

cers of the company had been in Washington, D. C., on important business for the corporation; that when the case was brought to issue in April, 1918, "or shortly before that date," affiant informed his co-counsel in Seattle by letter that the case would probably be set for trial late in May, and that it would be "necessary for defendant to be ready for trial before the end of that month"; that affiant was informed by letter and cablegrams from his co-counsel at Seattle that he had been diligently "trying to secure testimony in behalf of defendant for the past two months," but that because of the absence of the officers of the company from Seattle "said Lyons was unable to learn until a few days ago what witnesses and evidence defendant would produce in its behalf"; that this information came partly in a letter received from said Lyons on May 23, 1918, and partly in a cable message received on May 25, 1918; that said cable message stated that affidavits for a continuance would be made "to-day" at Seattle; that, so far as affiant had information, the substance of the testimony contained in the affidavits would be as follows: That one Nelson, in charge of construction work for the railroad company by virtue of a contract with defendant, would, if sworn, testify that he was in charge of construction in the summer of 1917; that he employed all laborers and had a monthly settlement with the company, his own compensation being 7½ per cent. of his expenditures; that the foreman (Palmer) named in plaintiff's complaint was employed by him and under his direction, and was not employed by the railroad company, or subject to its orders; that there was a standing order to all employés not to ride upon the car upon which plaintiff was riding when he was injured; that the foreman, Palmer, would testify that there was such a standing order to employés, and that it was well understood by the men; that upon the evening of the accident the men could have ridden on the standard flat car, as they were ordered to do; that to the best of his knowledge and belief affiant's co-counsel was unable until very recently to find and talk to said Nelson, the foreman; and that to the best of affiant's knowledge and belief Lyons had not been able to locate Palmer, the foreman.

The action was instituted December 12, 1917; summons was served upon defendant's agent in Alaska January 10, 1918; defendant filed a motion on February 9, 1918; the motion was denied March 15th, and answer was filed April 13th; reply was served on April 17th; on May 1st the court set the trial for May 17th, upon which day the motion for continuance and the affidavit in support thereof were filed.

The plaintiff below resisted the motion for a continuance, and his counsel by affidavit set forth that, when the motion to strike from the plaintiff's complaint was heard, plaintiff's attorneys announced in open court that they would earnestly urge and insist upon a trial at the first jury term of the court; that plaintiff, since his injury, had been confined in a hospital at Cordova, Alaska; that he was "entirely without means and unable to perform any kind of labor by which he could earn a livelihood"; that he had made a journey from Cordova to Valdez, bringing witnesses in support of his case; that he was ready to proceed with the trial, and that to continue the case over the term would

practically be a denial of justice, as he would be unable again to assemble his witnesses at the next jury term of the court; that by a motion filed on April 18, 1918, plaintiff had sought to require defendant to furnish plaintiff inspection of the contract alleged to have been entered into between Nelson and the defendant railroad company for the construction of the railroad; that the court ordered production for inspection before May 15th, but that after that date one of the counsel for the defendant company notified counsel for plaintiff that defendant did not have such a contract, and that therefore such inspection could not be had; that the only contract between Nelson and the company, pertaining to the employment of Nelson for construction, was contained in the minutes of a meeting of the board of trustees of the railroad company held May 9, 1918, but that an examination of said minutes disclosed that Nelson was employed by defendant and was receiving a salary, and that his duties were supervising and directing construction of the railroad.

Section 1001, Compiled Laws of the Territory of Alaska 1913, provides as follows:

"A motion to postpone a trial on the ground of absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and a statement of facts showing that due diligence has been used to procure it, and also the name and residence of the witness or witnesses."

We think plaintiff in error has failed to show diligence used to procure the attendance of Nelson as a witness. The showing is rather to the contrary, for the affidavit of counsel for defendant is that his cocounsel, Mr. Lyons, "was unable until very recently to find and talk to said George W. Nelson." Exactly what counsel meant by "very recently" is not disclosed; but apparently there was ample time between the date that the court set the case for trial and the date of the calling of the case for trial in which counsel could have procured the testimony of Nelson, or obtained an affidavit stating precisely what he would swear to if called to testify. Furthermore, there was the counter affidavit. The minute book of the company showed that Nelson was an employé of the defendant company and was receiving a salary.

With respect to evidence by Palmer in the affidavit in support of the motion for continuance, counsel does not assume to say that Palmer would be present to testify if the trial were postponed. There was no showing of effort, much less diligent effort, to find Palmer in order that his evidence might be had. The motion presented a matter for the exercise of judicial discretion, and no sound reason is given for interference with the decision rendered.

[2] It is urged that the court erred in refusing a requested instruction, stating substantially that the plaintiff knew the condition of the roadbed, or should have known it by observation, and that he took whatever risk was involved in riding upon the train upon which he was injured, and in refusing a request that, if it were more dangerous for Moller to ride on the front of the car at the head of the train than upon the standard car, he was guilty of contributory negligence in riding where he was. Counsel for plaintiff in error, in commenting upon

the issues of assumption of risk and contributory negligence, say that the court's instructions were "a fair statement of the law, but not so explicitly worded to fit the facts of the case." Surely, however, the requests did not fit the case, for they wholly ignored the important allegation of the plaintiff's complaint, which charged negligence on the part of defendant in driving the train and car on which the plaintiff was riding over the defective railroad track at an unusually high rate of speed, as well as the uncontradicted evidence in support of this allegation.

We find no error in the action of the court. Rio Grande Western Railroad Co. v. Leak, 163 U. S. 280, 16 Sup. Ct. 1020, 41 L. Ed. 160; Seaboard Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. Upon a careful examination of the record, we find that the case was one for submission to the jury, and that there was no error of law against the rights of the plaintiff in error.

The judgment is affirmed.

(257 Fed. 535)

CENTRAL STATE BANK v. McFARLIN.

In re B. A. LOCKWOOD GRAIN CO.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1919.)

No. 5051.

1. WAREHOUSEMEN ⟹15(2)—TRANSFER OF WAREHOUSE RECEIPTS—RIGHTS OF INDORSEE.
   The indorsement of warehouse certificates for grain to a bank as security transfers to the bank the legal title to the grain represented thereby.
2. WAREHOUSEMEN ⟹20—CONDUCT OF BUSINESS—MIXING OF GRAIN.
   Under Code Supp. Iowa 1913, §§ 3138a23, 3138a24, a warehouseman may mingle grain or products covered by outstanding warehouse receipts with other grain or products of like grade, whether owned by the warehouseman or other parties, and it will not constitute conversion or confusion of goods.
3. WAREHOUSEMEN ⟹25(7)—ISSUANCE OF WAREHOUSE RECEIPTS—CONVERSION.
   The grinding of wheat covered by warehouse receipts held by a bank by the warehouseman, which also operated a mill, without replacing it with other wheat, did not constitute conversion, so long as the products were kept on hand; but their sale, leaving insufficient wheat and products to satisfy the certificates, constituted conversion to the extent of the deficiency.
4. BANKRUPTCY ⟹340—ADVERSE CLAIM TO PROPERTY—WRONGFUL SALE BY BANKRUPT—TRACING PROCEEDS.
   Assuming it to be permissible for a claimant to trace personal property wrongfully sold by a person subsequently becoming a bankrupt into accounts receivable belonging to the bankrupt, such tracing must be specific and the identification clear. The burden of proof is on claimant, and a mere showing that the general assets of bankrupt, including accounts receivable, have been increased by the wrongful sale, is not sufficient.

Appeal from the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

In the matter of the B. A. Lockwood Grain Company, bankrupt; M. McFarlin, trustee. The Central State Bank appeals from an order denying priority to its claim. Affirmed.

Frank T. Jensen, of Des Moines, Iowa (Charles S. Bradshaw, of Des Moines, Iowa, on the brief), for appellant.

Charles Hutchinson, of Des Moines, Iowa (Oscar Strauss and Clark, Byers & Hutchinson, all of Des Moines, Iowa, on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

BOOTH, District Judge. This is an appeal from a judgment which denied the bank's petition to have the unpaid balance of its claim against the bankrupt allowed as a preferential claim, to be paid out of the proceeds of certain accounts receivable belonging to the bankrupt and collected by the trustee. The following facts appear:

The Shannon & Mott Company was an Iowa corporation, dealing in grain and products, owning and operating a mill and elevator at Des

Moines, Iowa. The B. A. Lockwood Grain Company was also an Iowa corporation, owning and operating elevators and dealing in grain and other products at Des Moines, Iowa. In 1911 the Lockwood Company bought all of the assets of the Shannon & Mott Company, but continued to carry on the milling business in the name of the Shannon & Mott Company. This ownership was, however, not known to the bank. Between January 26 and April 21, 1914, the Shannon & Mott Company issued to the Lockwood Company certain negotiable warehouse certificates, and the Lockwood Company thereafter indorsed to the bank these certificates as collateral security to certain promissory notes, made by the Lockwood Company to the bank, and bearing even dates with the indorsements of the certificates respectively. The form of the warehouse certificate is as follows:

"Shannon & Mott Company, Des Moines, Iowa.

"Grain Storage Certificate No. 6.

"This certificate is to certify that the Shannon & Mott Co., a corporation whose address is the city of Des Moines, Iowa, having complied with chapter 10, title 15, of the Code of Iowa of 1897, by executing the declaration required in such cases by said statutes and causing the same to be filed in the office of the recorder of deeds and duly recorded, as shown on the back of this certificate, which is made a part hereof, for value received, in hand paid by B. A. Lockwood Grain Co., of the city of Des Moines, Iowa, do hereby sell and convey, assign and transfer, unto the said B. A. Lockwood Grain Co. thirty-five hundred bushels of wheat and products stored in the buildings and structures hereinafter described at the several places hereinafter named, as follows:

"In said Shannon & Mott Co.'s iron-covered cribbing and frame elevator building, and frame iron-covered warehouse situated on their property at 15th and Mulberry streets, Des Moines, Iowa, and attached to and adjoining their mill building proper, to be delivered to the said B. A. Lockwood Grain Co., or their order, upon presentation and surrender of this certificate.

"Signed and executed at its office in the city of Des Moines, Iowa, in pursuance with the provisions of the above named statute.

"Dated this 26th day of January, 1914.

"[Signed] Shannon & Mott Company,
"By W. A. Applegate, Sec."

Six warehouse certificates, of similar form and purporting to cover 19,000 bushels of wheat and products, were indorsed by the Lockwood Company to the bank between June 5 and August 15 as collateral to notes amounting to $15,000. Other similar certificates, covering corn, are not here involved. The Lockwood Company was adjudicated a bankrupt August 24, 1914. None of the notes had been paid. From January 26, 1914, the Shannon & Mott Company had continued to receive into its elevators and warehouses large quantities of grain, to manufacture the same into products, and to sell the same.

Subsequent to April 21, 1914, there was never as much as 19,000 bushels of wheat on hand at any one time. At the time of the bankruptcy there was a certain quantity of wheat and products on hand. By stipulation between the bank and the receiver, this wheat and the products were sold, and the proceeds, amounting to something over $11,000, turned over to the bank, and applied upon its claim, without prejudice to the rights of either party. The balance of the bank's claim is approximately $6,800.

Among the assets of the bankrupt were certain accounts receivable, arising from mill products sold. The trustee collected approximately $8,700 of these accounts, and the bank petitioned that the balance of its claim be paid out of these proceeds, in preference to the claims of other creditors. The court below denied the bank's petition, but held the claim should be allowed as a general claim. It is admitted that 19,000 bushels of wheat, if on hand at the time of the bankruptcy, would have been more than sufficient to pay the bank's claim.

The issue is stated by the appellant bank as follows:

"The correctness of the claim against the estate is not disputed, and the issue is whether or not there has been a proper tracing of trust funds."

The appellee takes the same position.

The acquiring by the bank of the warehouse certificates involved several distinct transactions. These several transactions began, so far as the bank was concerned, on the dates when the warehouse certificates were indorsed by the Lockwood Company to the bank. The issuance of warehouse receipts by Shannon & Mott Company to the Lockwood Company was a mere bookkeeping transaction, inasmuch as the Lockwood Company owned all of the assets of the Shannon & Mott Company, and was in reality running the business of that company. The Lockwood Company, therefore, stands in the transactions with the bank as the warehouseman dealing directly with the bank.

[1] The indorsement of the warehouse certificates to the bank transferred the legal title to the wheat and products which they represented. The warehouse certificates so read, the statutes of Iowa so provide, and such is the general law in the absence of statute. Section 3138a41, 1913 Supp. to Code of Iowa; Gibson v. Stevens, 8 How. 383, 12 L. Ed. 1123; Dale v. Pattison, 234 U. S. 399, 34 Sup. Ct. 785, 58 L. Ed. 1370, 52 L. R. A. (N. S.) 754. This title thus vested in the bank, though liable to be divested by the payment of the notes, was nevertheless a legal title, and not a lien. The certificates cover wheat and products. Appellant bank claims that this was legal under the Iowa statutes, and we shall assume, without deciding, that this is so. No specific proportion between wheat and products is mentioned.

[2] Under the statute of Iowa the warehouseman had the right to mingle the wheat and products thus belonging to the bank with other wheat and products of like grade, whether belonging to the warehouseman or to third parties. This did not constitute conversion, nor confusion of goods. Sections 3138a23, 3138a24, 1913 Supp. to Code of Iowa; Sexton v. Graham, 53 Iowa, 181, 4 N. W. 1090.

[3] The bank knew that the Shannon & Mott Company was constantly grinding the wheat into products. We conclude, therefore, that the mere grinding of the bank's wheat, without replacing it with other wheat, but still keeping the products on hand, would not have been a conversion.

But the grinding of wheat into products and selling of those products down to a point where there was not sufficient wheat plus products left on hand to satisfy the bank's certificates constituted conversion to the extent of the deficiency. Such conversion would give rise to an action for damages. A further result might also follow. The

products so sold being made up in whole or in part of wheat belonging to the bank, there might arise, in the absence of countervailing circumstances, a constructive trust attaching to the accounts payable by the purchaser.

[4] Bearing in mind the foregoing, let us examine the several transactions between the Lockwood Company and the bank. On June 5, 1914, the Lockwood Company transferred to the bank warehouse certificate No. 7, for 3,500 bushels of wheat and products. As the tables of figures in evidence show that it was not impossible that this amount of wheat and products was on hand at the time, and as there is a presumption that the Lockwood Company, carrying on the business and being in fact the warehouseman, would not negotiate the certificate, unless that amount of wheat and products was on hand, it may be taken for granted that the certificate represented existing wheat and products. On July 1, however, there was on hand but 1,900 bushels of wheat, so that at least 1,600 bushels of certificate No. 7 must be traced into products which were on hand June 5, 1914, or manufactured subsequent thereto, or into the accounts resulting therefrom. The bank cannot claim ownership in 1,600 bushels of wheat subsequently put in, merely because this amount of wheat had possibly been on hand June 5, and had been ground into products. The certificate covered wheat and products indifferently. The 1,900 bushels of wheat remaining on hand July 1, 1914, can permissibly be traced into the 3,332 bushels on hand August 24, 1914.

By this analysis and similar analyses of the other several transactions relating to the remaining warehouse certificates, it appears that the only accounts which can be properly looked to, so far as certificate No. 7 is concerned, as possibly originating from the bank's products, are those accounts originating subsequent to June 5, 1914; as to certificate No. 10, subsequent to July 14, 1914; as to certificate No. 11, subsequent to July 21, 1914; as to certificate No. 6, subsequent to July 25, 1914; as to certificate No. 8, subsequent to August 10, 1914; and as to certificate No. 9, subsequent to August 15, 1914—these being the respective transfer dates. Furthermore, in each instance the account must be shown to have originated from a sale of products, which left less wheat and products on hand than were called for by the outstanding certificates.

There has been no such identification of the accounts going to make up the $8,700 now in the hands of the trustee. The utmost that appellant bank can claim is that these accounts originated subsequent to April 21, 1914; and this is attempted to be deduced from the wording of an ambiguous stipulation, and not from direct evidence bearing upon the matter. It is claimed by the appellee that the record shows that the accounts represented by the $8,700 are identified merely as originating subsequent to January 26, 1914. There is no presumption that the $8,700 represents only accounts which originated during the periods heretofore specified, and in amounts so specified as to the particular periods, nor that any of said accounts originated at any particular time. The burden of proof rests upon the bank. Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806. And the proof must be

clear. Empire State Surety Co. v. Carroll Co., 194 Fed. 593, 114 C. C. A. 435; State Bank v. Alva Bank, 232 Fed. 847, 147 C. C. A. 41; Zenor v. McFarlin, 238 Fed. 721, 151 C. C. A. 571.

Furthermore, the presumption which the parties seem to have conceded attached to the wheat and products on hand August 24, that they were either the identical wheat and products covered by the bank's certificates, or wheat and products which had been set aside by the bankrupt to replace wheat and products which had unquestionably belonged to the bank, cannot, in our judgment, apply to the accounts receivable. Such presumption as to the wheat and products on hand August 24 rests upon a supposed intention on the part of the bankrupt to replace and keep intact trust property, even after it had been once wrongfully used, coupled with the fact that such substituted property of the same kind is found remaining in the bankrupt's possession. But these accounts receivable were not fungibles. Each account had a definite origin, at a definite date, and was for definite products sold, and had behind it a definite individual credit. The bankrupt could not legally substitute in place of an account to which a constructive trust had attached another account; therefore no such intention on its part will be presumed.

The theory of the bank seems to be that during the period after April 21, 1914, the bank owned all the wheat on hand and which afterwards came in, all the products made from said wheat, all the accounts originating from sales of said products, or that its ownership first attached to 19,000 bushels of wheat; next, attached to the products and resulting accounts derived from said wheat; next, on the coming in of more wheat, the ownership shifted from the accounts and the products, and attached itself again to the new wheat; and so on, as wheat was transferred into products and acccounts, and other new wheat brought in.

Both forms of this theory are dependent upon the doctrine that a claimant whose property has helped to swell the general assets of a party subsequently becoming bankrupt, has a prior right in those general assets without specific identification or tracing of the claimant's property. That doctrine has been expressly repudiated by this court. Empire State Surety Co. v. Carroll Co., 194 Fed. 593, 114 C. C. A. 435; Macy v. Roedenbeck, 227 Fed. 346, 142 C. C. A. 42, L. R. A. 1916C, 12; State Bank v. Alva Bank, 232 Fed. 847, 147 C. C. A. 41; Zenor v. McFarlin, 238 Fed. 721, 151 C. C. A. 571.

The conclusion reached by the trial court was right, and the judgment is affirmed.

(257 Fed. 540)

MOORE et al. v. SIMMS.

(Circuit Court of Appeals, Sixth Circuit. November 12, 1918.)

No. 3174.

1. BANKRUPTCY ⟹328—PROOF OF CLAIMS—TIME.

Under Bankruptcy Act, § 57n (Comp. St. § 9641), claims shall not be proved subsequent to one year after adjudication in bankruptcy, except where claims are liquidated by litigation and final judgment is rendered within 30 days before or after expiration of the time, when they may be proved, if filed within 60 days after rendition of the judgment.

2. BANKRUPTCY ⟹328—TIME FOR FILING CLAIMS—"LIQUIDATION BY LITIGATION."

Claim sought to be proved against a bankrupt's estate by his coguarantors, who with him agreed to pay to banks all money advanced for a certain company, *held* not "liquidated by litigation," within Bankruptcy Act, § 57n (Comp. St. § 9641), extending the time for filing of claims so liquidated; the bankrupt not having been a party to suits by a bank.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liquidated by Litigation.]

3. BANKRUPTCY ⟹331—PROOF OF CLAIM BY COGUARANTORS—STATUTE.

Where a bank had the right to prove its claim against a bankrupt, who had signed a guaranty of repayment to it of moneys advanced to a company, the bankrupt's coguarantors had the right, under Bankruptcy Act, § 57i (Comp. St. § 9641), to prove the bank's claim in case the latter failed to do so, and whether the indebtedness was then due or not.

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

In Bankruptcy. Petitions by Thomas Moore and others for permission to file and prove claims against the bankrupt estate of R. H. Edelen, opposed by Ben F. Simms, trustee, etc. From judgment the claims were not provable (248 Fed. 580), petitioners appeal. Affirmed.

Augustus E. Willson, of Louisville, Ky., for appellants.

J. V. Norman and John S. McElroy, both of Louisville, Ky., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. This is an appeal from a judgment of the District Court. The question for decision is whether the petitioners should have been permitted to file and prove their claims against the bankrupt estate of R. H. Edelen. The court below adjudged that the claims were not provable, since they were not filed with the trustee within the time prescribed by section 57n, Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 560 [Comp. St. § 9641]).

The material facts are undisputed, and are in substance as follows: The claimants and the bankrupt on March 7, 1912, by a written instrument guaranteed and agreed to pay to certain banks all sums of money advanced by the banks to or paid by them for Distillers' Cooperage Company. Each of the signers of the agreement was bound for the whole amount of the indebtedness incurred by virtue of said written

instrument, but the signers thereof, as between themselves, were liable only in proportion to the amount of stock held by them respectively in the Distillers Cooperage Company. By virtue of this instrument, on September 11, 1912, four notes were executed by L. B. Samuels, treasurer of said Cooperage Company, to the People's Bank of Bardstown, aggregating $15,000. On April 5, 1915, Edelen was adjudicated a bankrupt. On October 21, 1917, suits were brought on these notes by the bank in the Nelson circuit court of the state of Kentucky, against the signers of the instrument referred to, except the bankrupt, Edelen, and judgments rendered thereon, amounting to $16,118.05. These judgments have been paid by claimants. On November 12, 1917, more than 2½ years after adjudication, petitioners filed their claims against the bankrupt estate for 31.6 per cent. of the total claims. The trustee filed two objections to the allowance of the claims, one of which was decided adversely to him, and need not be further noticed. The other was that—

"No one proved or attempted to prove any part of the claim now asserted against the estate within one year of the date of adjudication; no steps were taken by claimants or any one else within one year of the date of adjudication to liquidate any part of the claims asserted; and claimants are barred by section 57n of the Bankruptcy Act of 1898 from proving said claims or any part thereof."

[1] The general rule is that claims shall not be proven subsequent to one year after adjudication in bankruptcy. There is an exception which provides that where claims are "liquidated by litigation," and final judgment therein is rendered within 30 days before or after the expiration of such time, then they may be proven, if filed within 60 days after the rendition of such judgment; section 57n, Bankruptcy Act 1898.

[2] Since the time extension relates to claims "liquidated by litigation," the primary question presented is whether the claims under consideration were so "liquidated" in so far as they relate to Edelen.

The litigation in the Nelson circuit court was a suit by the owner of the notes, on which judgments were based, against the claimants in this proceeding. The bankrupt, Edelen, was not a party thereto, nor were the judgments in those cases rendered against him. Until that litigation was ended by the judgments against claimants, and they had paid off the same in whole or in part, they had no claim against Edelen arising out of their obligation to the bank and their relations to each other. It is insisted that there is a real debt due and owing by the bankrupt, Edelen, to claimants under the instrument in question. That may or may not be true. There appears no obstacle to Edelen requiring such claim to be "liquidated by litigation." It does not appear that his liability under the instrument has been admitted by him, nor has it been "liquidated by litigation." If it is a claim which has not been "liquidated by litigation," clearly it could not be proven, if presented after expiration of one year from adjudication. If the litigation in the Nelson circuit court, to which Edelen was not a party, did not bind him, that is, did not estop him from litigating either his liability to the bank, or from litigating with his co-obligors his liability to contribute,

then in what sense can it be said that the claims now presented have been "liquidated by litigation" as to Edelen, within the meaning of section 57n? If claimants had obtained a judgment against Edelen for his share of their joint liability in a suit begun before bankruptcy, and had filed that as a provable claim against the bankrupt estate, another and different question would have been presented. That has not been done. If any effort has been made by claimants to "liquidate by litigation" with Edelen the claim now presented, other than filing their claims in this proceeding, this record does not disclose it.

[3] It does not result from this conclusion that claimants were without an adequate remedy for their protection, except by invoking the provision for liquidating by litigation. Claimants and the bankrupt were, as between themselves and the bank, not merely sureties for the corporation, nor, as between themselves and the bank, were they accommodation indorsers, although as between themselves and the corporation they might be mere sureties or indorsers. They signed the agreement by reason of their interest in the corporation. In that agreement neither the word "surety" nor the word "indorser" is found. The signers agree not merely "to be responsible for and guarantee the payment of all" moneys advanced to or paid for the corporation by the bank, but that they would "guarantee and pay to said bank all notes, bills, or other demands executed" to the bank by or in the name of the corporation through its treasurer, "as fully and to have the same effect as if we were personally present and signed each and every note," etc. The bank had thus the right to prove its claim against the bankrupt, and claimants had the right, under section 57i of the act, to prove the bank's claim in case the latter failed to do so, and whether the indebtedness was then due or not. This being so, it is unnecessary to consider what the rights and remedies of claimants might have been had claimants and the bankrupt been, as between themselves and the bank, merely sureties or indorsers for the corporation.

Entertaining these views, we do not deem it necessary to construe the clause "within thirty days before or after the expiration of that time," found in section 57n.

Our conclusion is that the litigation in the case of the bank and others against claimants in the Nelson circuit court was not a "liquidation by litigation" of the claims now presented by claimants against the bankrupt estate of Edelen, within the meaning of section 57n of the Bankruptcy Act.

In so far as it may be thought that Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, Powell v. Leavitt, 150 Fed. 89, 80 C. C. A. 43, and other cases cited by appellants, are contra to the conclusion reached, we find nothing to support such contention. The facts there involved are materially different from the facts here, and the present case is clearly distinguished.

Affirmed, with costs.

(257 Fed. 543)

ROBINSON v. PARHAM.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1919.)

No. 3222.

1. BROKERS ⟹54—REALTY BROKER—RIGHT TO COMPENSATION—WRITTEN PROMISE.

Where a realty broker procured a purchaser acceptable to the owner, and ready, able, and willing to buy on the agreed terms, his right to recover the agreed compensation from the owner, though the sale fell through on account of a deficiency in acreage, was not impaired by the owner's giving, after execution of the sale contract, a written promise to pay the broker his specified compensation.

2. BROKERS ⟹63(1)—REALTY BROKER—RIGHT TO COMPENSATION—FAILURE OF SALE.

Realty broker is entitled to compensation, where he procures a purchaser acceptable to the owner, and ready, able, and willing to buy on the agreed terms, though the sale fails of consummation through the fault of the owner alone.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by E. R. Parham against H. W. Robinson. To review a judgment for plaintiff, defendant brings error. Affirmed.

Parham, a licensed real estate agent and broker, brought this action against Robinson to recover $7,500 for finding a purchaser of a plantation, consisting of 3,800 acres, beloging to Robinson and situated on St. Francis river in Arkansas. The suit was originally brought in the chancery court of Shelby county, Tenn., a court having jurisdiction of the subject-matter and the parties in the cause, and was removed to the court below, where it was transferred to the law side of the docket. The pleadings were then reformed accordingly. A jury having been duly waived, the cause was heard by the court, and judgment rendered in favor of Parham for the sum claimed, with interest from January 1, 1918. Robinson prosecutes error.

The court's findings and conclusions follow:

"On the evidence in this case I find that the plaintiff procured a purchaser for the land of his client, Robinson (the defendant), as per their agreement. The purchaser (Kirkland) and Robinson executed a written contract for the purchase and sale of the land. Immediately thereafter the defendant promised to pay to plaintiff $7,500 for his services in the matter, and gave to plaintiff a written statement to that effect. Subsequently, and without plaintiff's knowledge, Robinson and Kirkland mutually agreed to abandon the trade. This action grew out of Robinson's misrepresentation or mistake made in the contract of sale as to the number of cleared acres in the plantation. The plaintiff had no knowledge of the number of cleared acres, other than was stated to him by the defendant, both before and on the day the contract of sale was made, and that was that there were 2,100 cleared acres. I find that the plaintiff had performed all that was required of him under his contract with Robinson in effecting a sale of the defendant's land. That a deed was not executed and the transaction consummated between Robinson and Kirkland, as per contract, was the result of the misrepresentation or mistake of Robinson, in his representation to Kirkland in the contract of sale that there were at least 1,900 cleared acres in the plantation. I find the issues in favor of the plaintiff, and a judgment will be entered for $7,500, with interest at 6 per cent. per annum since January 1, 1918, and costs, against the defendant."

R. Lee Bartels, of Memphis, Tenn., for plaintiff in error.

W. W. Farabough, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Our examination of the evidence convinces us that it amply sustains the court's findings. The controversy grew out of the acreage contained in the plantation, which in reality had been cleared and previously cultivated. The contract between the owner, defendant Robinson, and the proposed purchaser, Kirkland, among other things provides:

"Robinson represents that there are 1,900 acres of the above-described land that are cleared and have been in actual cultivation, and he covenants and agrees that there shall be in all at least 2,100 acres of said plantation cleared and ready for cultivation in time for the planting of crops in the spring of 1918."

At the time plaintiff was employed to find a purchaser of the plantation, defendant represented to him that there were 2,100 acres of cleared land; and plaintiff, in reliance upon this representation, had communicated it to Kirkland, and succeeded in procuring an offer from him as to terms of sale which were satisfactory to defendant, though Kirkland, after examining the plantation, was doubtful as to the acreage of the cleared and cultivated land. This doubt resulted in the above-quoted provision of the contract, and also in an arrangement to have the acreage tested by a survey. It turned out that there were only 1,723 acres of cleared and previously cultivated land, and thereupon, without the knowledge of plaintiff, the owner and purchaser abandoned the transaction.

[1] The District Judge finds, as we have seen, that immediately after the execution of the sale contract defendant "promised to pay to plaintiff $7,500 for his services in the matter, and gave to plaintiff a written statement to that effect." It will be observed that this occurred while plaintiff was without knowledge of any shortage in the cleared and cultivated acreage, and before the survey and the abandonment. It is insisted that considering this written statement in connection with the sale contract, the payment was to be made on condition that the sale should be carried out. It is to be said of this that the contention ignores the fact that the plaintiff's services were secured and rendered before his compensation was definitely fixed. The language of the memorandum is entirely consistent with a treatment of the sale as consummated. The effect of the written statement was, not to impair plaintiff's accrued right of recovery, but rather to avoid the risk of differences and contest touching the value of his services.

[2] The settled rule is that an agent is entitled to compensation where he procures a purchaser who is acceptable to the principal, and ready, able, and willing to buy on the agreed terms, despite failure of consummation of sale through fault alone of the principal. Dotson v. Milliken, 209 U. S. 237, 245, 28 Sup. Ct. 489, 52 L. Ed. 768; Hannan v. Moran, 71 Mich. 261, 262, 38 N. W. 909, opinion by Mr. Justice Campbell; Schweid v. Storandt, 157 App. Div. 855, 859, 143 N. Y. Supp. 161, affirmed in 217 N. Y. 637, 112 N. E. 1075, and followed in Ritchey v. Murphey, 181 App. Div. 429, 430, 431, 168 N. Y. Supp. 830.

The effect of an agent's reliance upon his principal's representation, which proves to be inaccurate, finds analogy in a principal's default through failure of title (Cheatham v. Yarbrough, 90 Tenn. 77, 79, 80, 15 S. W. 1076; Fitzpatrick v. Gilson, 176 Mass. 477, 479, 480, 57 N. E. 1000; Smith v. Peyrot, 201 N. Y. 210, 214, 215, 94 N. E. 662, and citations), or capricious refusal (Kock v. Emmerling, 22 How. 69, 74, 16 L. Ed. 292; Home Banking & Realty Co. v. Baum, 85 Conn. 383, 386, 82 Atl. 970).

The judgment must be affirmed, with costs.

(257 Fed. 545)

McLAUGHLIN v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1919.)

No. 3203.

1. CARRIERS ⟹347(3)—PASSENGERS—DEATH ON TRACK—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether an intending passenger, struck on railroad tracks while attempting to cross to board a train, was negligent, is a question for the jury, unless it is clear that reasonable minds can reach only the conclusion that a person of ordinary prudence would not have made the attempt under the circumstances.

2. CARRIERS ⟹347(3)—PASSENGERS—DEATH ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for death of an intending passenger, struck by an express train which she thought was her train, and which she crossed the tracks to board, question of contributory negligence *held* for the jury under the evidence.

In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by Elmer McLaughlin, administrator of the estate of Naomi Seidner, deceased, against the Pennsylvania Company. To review judgment for defendant, plaintiff brings error. Reversed, with directions to award new trial.

Francis R. Marvin, of Cleveland, Ohio, for plaintiff in error.

Thomas M. Kirby, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Upon the trial, at the conclusion of the opening statement of plaintiff's counsel, the court sustained defendant's motion for direction of verdict in its favor upon the pleadings and opening statement. This writ is to review the judgment thereon.

The gist of the opening statement was that decedent, a lady more than 50 years old, desiring to take a local passenger train from Beloit, Ohio, to Columbiana, in that state, where she resided, bought a ticket for such transportation from defendant's ticket agent and station master at Beloit shortly before the train was due to leave, and was then informed by the agent that her train was due in five minutes. Soon after-

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wards the whistle of an approaching train was heard, which the agent informed decedent was her train. She then started to take it, accompanied by her two daughters, one of whom was to accompany her on the train. To do so she was obliged to cross three sets of tracks to reach a cinder platform, elevated a foot or so above the tracks, and on the farther side of the track on which her east-bound train was to run; it being necessary to use this platform to board her train. There was no crossing or walkway provided over the tracks and no planks between the rails; the space between tracks and rails being filled with slag. As decedent and her daughters started to cross the tracks, there was approaching from the west a train which she and her daughters supposed to be her train, and which they supposed was going to stop at the station. It was in fact a fast train of defendant's, which was not to stop at Beloit, and which was running behind its schedule at a speed of 50 to 60 miles per hour, on the track which should have been occupied by decedent's train, and practically on the time of that train. As decedent reached the farther rail of the last track she stumbled and fell, and was struck and killed by the fast train. The direction of verdict was on the ground that decedent was, as matter of law, guilty of contributory negligence in passing in front of the swiftly moving train.

Defendant properly assumes that the opening statement showed negligence on defendant's part, and we have therefore omitted that part of the statement. The only question thus is whether it conclusively appears that decedent was guilty of contributory negligence in crossing the third track in front of the approaching train.

[1, 2] It does not so conclusively appear, unless it is clear that reasonable minds can reach only the conclusion that a person of ordinary prudence would not have so crossed under the circumstances appearing. We think this cannot be said. True, it must be assumed that until she reached the last track she was in a place of safety, that she knew when she started to cross the track that a train was approaching upon it, and that it would eventually pass beyond the place where she was trying to cross. But it is not accurate to say that she knew or believed that the train would, in the nature of things, intercept her path. On the contrary, according to the statement, defendant had assured her, and she believed, that the approaching train was her train; and, so believing, a reasonable person would naturally assume that it would stop but a few feet beyond the point where she proposed to cross, and that it would thus have nearly come to a stop when it reached her place of crossing.

Assuming that she saw the train but three seconds before she was struck, if running at a speed of but 50 miles an hour it was then 216 feet away. To cover that distance the train which decedent expected to take, slowing down for a stop, but running even 20 miles an hour, would require seven seconds as against three seconds for the fast train—a margin of four seconds. Or, otherwise stated, the slow train would travel in the three seconds but about 87 feet, as against 216 feet, leaving a clear margin of safety of 129 feet. If the train was seen more than three seconds before the collision, or if it was running

more than 50 miles an hour, it was more than 216 feet away when seen, and the margin of safety was correspondingly increased. Consistently with the opening statement, decedent may well have thought that she had ample time to cross the track ahead of the approaching train, assuming, as she had the right to do, that it was to stop at the accustomed place; and a jury may equally well have thought, not only that she would have had ample time to cross had the train been the one she expected to take, and which she had been led by defendant to believe was her train, but that decedent was not negligent in attempting to cross under the conditions thus appearing. If, as the statement seems to mean, decedent's daughters thought the approaching train was her train, such fact, if communicated to decedent, could properly be taken into account by her as affecting the prudence of crossing the tracks.

Without regard, therefore, to the doctrine of "intervening track," the judgment of the District Court must be reversed, with directions to award a new trial.

(257 Fed. 547)

BURROUGHS ADDING MACH. CO. v. DIAL.

In re COLLIER.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1918.)

No. 3157.

1. SALES ⟹464—CONDITIONAL SALES—RETAKING POSSESSION—STATUTE.
   Gen. Code Ohio, § 8570, imposes a limitation only on the right of a conditional seller to retake the property on default, and was not intended to vitiate the contract, but merely to protect the purchaser.
2. SALES ⟹484—CONDITIONAL SALES—RETAKING POSSESSION—STATUTES.
   Where it does not appear that, on attempting to retake possession of property conditionally sold, or otherwise, the seller had violated Gen. Code Ohio, § 8570, nor any law of Ohio, section 12464, providing that a seller who violates any of the provisions of law, in taking possession or repossession of the property, shall be fined, is not applicable.
3. SALES ⟹464—CONDITIONAL SALES—VALIDITY.
   Conditional sale contracts are valid at common law, and, in the absence of an Ohio statute declaring such contracts, made in the state, illegal, or declaring it an offense either to make or attempt to enforce such conditional contracts, except under circumstances not existing in the present case, the Circuit Court of Appeals cannot hold that such an Ohio contract is illegal.

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Petition by the Burroughs Adding Machine Company against George S. Dial, trustee in bankruptcy of George A. Collier, bankrupt. From an order dismissing the petition, petitioner appeals. Reversed and remanded, with directions.

Floyd A. Johnston, of Springfield, Ohio, for appellant.

George S. Dial, of Springfield, Ohio, pro se.

Before KNAPPEN and DENISON, Circuit Judges, and McCALL, District Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

McCALL, District Judge. This case is here on appeal from an order of the District Court, dismissing an intervening petition of appellant filed in the proceedings of George A. Collier, bankrupt, to recover from George S. Dial, trustee in bankruptcy, one Burroughs adding machine, or the balance of the unpaid purchase money due thereon. The case was heard on an agreed statement of facts, which present two questions for decision: (1) Was the contract of sale and purchase a Michigan or an Ohio contract? (2) If an Ohio contract, is it a legal and valid one?

The contract was executed by and between appellant and George A. Collier, the bankrupt, for an adding machine, and is in the usual form of conditional sales contracts; the consideration being $150, with $15 cash payment, title reserved in the vendor to secure deferred payments. The clause of the contract which is the occasion for this controversy reads as follows:

"In default of any payment, you or your agents may, at your option, take possession of and remove said adding machine without legal process; and in such case all payments theretofore made by the undersigned on account of this order shall be deemed and considered as having been made for the use of said adding machine during the time the same remained in the possession of the undersigned purchaser, and shall be retained and kept by you as such payment for rental and as liquidated damages; that the purchaser herein for himself and his successors in interest hereby waives, so far as is consistent with public policy, the benefits of any statute of this state, that may conflict with the conditions of this order, and any causes of action thereby given."

The contention of the trustee is that the contract under the laws of Ohio is illegal, and that therefore appellant is not entitled to any relief, for the reason that it cannot make out its case without the enforcement of an illegal agreement. The court below took this view, and held that the contract was in contravention of section 8570 of the Ohio General Code as construed and applied in Croneis Bros. v. Toledo Scale Co., 89 Ohio St. 168, 106 N. E. 5. Said section, in so far as it is here involved, is as follows:

"When such property * * * is so sold or leased, * * * the person who sold * * * shall not take possession of such property without tendering or refunding to the purchaser, * * * or any party receiving it from the vendor, the money so paid, * * * anything in the contract to the contrary notwithstanding. * * * But the vendor shall not be required to tender or refund any part of the amount so paid unless it exceeds twenty-five per cent. of the contract price of the property."

[1] Speaking generally, the only prohibition in the statute is that the vendor shall not repossess himself of property conditionally sold without tendering or refunding to the purchaser the money theretofore paid on the property, although the contract may provide otherwise; but the vendor shall not be required to tender or refund any part of the amount paid unless it exceeds 25 per cent. of the contract price of the property. It imposes a limitation only on the right of the vendor to retake the property. It was not intended to vitiate the contract, but it does protect the purchaser.

[2] The agreed statement of facts shows that a true copy of the contract was duly filed in the office of the recorder of Clark county, as

required by section 8568 of the Ohio General Code. It not appearing that, on attempting to retake possession of the property or otherwise, the vendor had violated section 8570, supra, nor any law of Ohio, section 12464, which provides that a vendor who violates any of the provisions of law in taking possession or repossession of such property, shall be fined not more than $100, is not applicable.

[3] Conditional sale contracts are valid at common law, and in the absence of a statute of Ohio declaring conditional sale contracts made in that state illegal, or declaring it an offense either to make or attempt to enforce conditional contracts, except under circumstances not here existing, we are unable to agree with the court below in its conclusion.

The appellee cites and relies on Croneis Bros. v. Toledo Scale Co., supra, as determinative of this case. We find nothing in the syllabus of that case (which in Ohio is considered the ruling law of the case) contra to the views herein expressed, nor to the conclusion we reach that, under the laws of Ohio as applied to the case before us, the contract in question was neither illegal nor void. In the Croneis Case the vendor had never parted with the possession of the machine; the vendee having refused to carry out his contract to purchase. It was held that the contract was so far void as to forbid recovery by the vendor of the purchase price agreed to be paid. That case is clearly distinguishable from the present case. On the other hand, in Re National Cash Register Co., 174 Fed. 579, 98 C. C. A. 425, this court held that the statutory provisions in question were not applicable to the case of a vendor who was seeking to enforce a lien existing at common law, which has not been changed by statute. And see In re Bettman-Johnson Co. (C. C. A. 6), 250 Fed. 657, 666, 163 C. C. A. 3.

We deem it unnecessary to consider the other question, since it is conceded that, if the contract is a Michigan contract, it is valid and when registered in Ohio is enforceable there.

The result is that the case must be reversed and remanded, with direction that the trustee return to the petitioner the adding machine in question, or that he pay to it an amount equal to the reasonable value of the machine at the time it was sold by the trustee, not to exceed the amount of unpaid purchase money, with interest.

(257 Fed. 550)

VEDIN v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919. Rehearing Denied June 2, 1919.)

No. 3211.

1. CONSTITUTIONAL LAW ⟹46(3)—INDICTMENT AND INFORMATION ⟹108—STATUTES—VALIDITY—NECESSITY OF DETERMINATION.

The statute on which an indictment is found is determinable as a matter of law from the facts charged although the statute is not mentioned and indictment is brought under another statute, and where the facts alleged in the indictment charging the making of false affidavits as to annual assessment work on a placer claim brought the case within Comp. Laws Alaska 1913, § 162, it was immaterial whether Sess. Laws Alaska 1915, c. 10, violation of which was charged, was constitutional.

2. INDICTMENT AND INFORMATION ⟹121(2), 132(1)—ELECTION—BILL OF PARTICULARS.

While the defendant in a criminal action is entitled to know the statute under which he is being prosecuted, yet where the indictment specifically named the statute, and the record did not show that the prosecution relied on any other, although the facts alleged brought the case within another statute, a motion to elect was properly denied; the proper procedure being to apply for a bill of particulars.

3. PERJURY ⟹36—OFFENSES—INSTRUCTED VERDICT.

In a prosecution for making false affidavits as to annual assessment work on a placer claim in violation of the Alaska law, *held* that, while the evidence for the prosecution, standing alone, would be insufficient to sustain a conviction, yet, in connection with discrepancies of defendant's own testimony, denial of his motion for instructed verdict was proper.

4. CRIMINAL LAW ⟹1056(1)—APPEAL—EXCEPTIONS TO INSTRUCTIONS—NECESSITY.

Where no exceptions were taken to the instructions, the appellate court cannot consider assignments of error based on portions of an instruction.

In Error to the District Court of the United States for the Fourth Judicial Division of the District of Alaska; Charles E. Bunnell, Judge.

G. A. Vedin was convicted of making false affidavits of annual assessment work upon several association placer claims, and he brings error. Affirmed.

Leroy Tozier, of Fairbanks, Alaska (De Journel & De Journel, of San Francisco, Cal., of counsel), for plaintiff in error.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and R. F. Roth, U. S. Atty., and Harry E. Pratt, Asst. U. S. Atty., both of Fairbanks, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted on three counts of an indictment which charged him with making three several false affidavits of annual assessment work upon three several association placer mining claims for the year 1916. The indictment in each count charged violation of chapter 10 of the Session Laws of Alaska of the year 1915. A demurrer was interposed to the indictment

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*Certiorari denied 250 U. S. —, 40 Sup. Ct. 11, 64 L. Ed. —.

on the ground that the Session Laws so referred to are unconstitutional and void. The demurrer was overruled. The plaintiff in error, before the introduction of any evidence, demanded that the prosecution elect, and inform him, under what law it was prosecuting the defendant in the trial of the case, which motion was renewed at the close of the government's case. The motions were denied. These rulings are assigned as error.

[1] We need not inquire into the question of the constitutionality of the Session Laws of 1915, for the facts charged in the indictment were sufficient to constitute an offense under section 162 of the Compiled Laws of Alaska of 1913, for the statute on which an indictment is found is determinable, as a matter of law, from the facts charged, and they may bring the offense charged within an existing statute, although the same is not mentioned, and the indictment is brought under another statute. Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509; United States v. Nixon, 235 U. S. 231, 35 Sup. Ct. 49, 59 L. Ed. 207; Wechsler v. United States, 158 Fed. 579, 86 C. C. A. 37; United States v. Sandefuhr (D. C.) 145 Fed. 49; United States v. Wood (D. C.) 168 Fed. 438; Ex parte King (D. C.) 200 Fed. 622; Commonwealth v. Peto, 136 Mass. 155.

[2] Nor do we find error in the denial of the motions to elect. Undoubtedly the defendant in a criminal action is entitled to know the statute under which he is being prosecuted. In this case the indictment specifically named a statute. The record does not advise us that the prosecution at any time relied on any other statute. The question that comes to us is whether or not the rights of the plaintiff in error have been prejudiced by a ruling of the court below. It is clear that it could make no difference to his rights whether he were prosecuted under the one or the other of the laws which make punishable the acts which are charged in the indictment. The record does not show that there was any uncertainty as to the law which the prosecution relied upon; but, if there were, the remedy was not by demanding election, but by applying for a bill of particulars. Morris v. United States, 161 Fed. 672, 681, 88 C. C. A. 532.

[3] The plaintiff in error relies upon his motion, made at the close of the testimony, for an instructed verdict of not guilty, and now contends that there was no evidence to sustain the verdict. The association placer claims were 160 acres each. They were located in a rough and brushy country. The affidavits stated that the work was done by drilling holes on one claim about 100 feet from the northern boundary and about 700 feet from the western boundary; on another claim about 300 feet from the northern boundary and about 200 feet from the eastern boundary; on the third claim about 200 feet from the southern boundary and about 200 feet from the eastern boundary. The direct evidence adduced to show that such work was not done consisted in the testimony of men who for the most part had relocated the land involved and were interested witnesses. They testified that they never saw the plaintiff in error at work on the claims, that in 1917 they went upon the claims and with a tape line measured the distances

from the boundaries as indicated in the affidavits, and at and around the points of intersection they found no sign of work having been done, no dump, and no clearing of brush. These examinations were made at times when the snow was from 10 to 12 inches deep, and the search for the drill holes was made by kicking the snow about.

The evidence for the prosecution, if it stood alone, would clearly be insufficient to sustain a conviction of perjury. It is not disputed that the earth removed by drilling holes by a hand drill, such as the plaintiff in error claimed to have drilled, would amount to but a few panfuls. The plaintiff in error testified that he did not measure the distances from the boundary lines, but only estimated them. It is too obvious to require discussion that the testimony of the witnesses for the government was insufficient to show, beyond a reasonable doubt, that the holes had not been drilled. If the plaintiff in error had stood upon his motion to dismiss, made at the close of the testimony, a different case would now be presented. But he waived his motion by testifying in his own behalf, and in the discrepancies of his own testimony as to the work done, and by whom it was done, and the rebuttal of portions thereof by the witnesses for the government, there is evidence tending to show that the affidavits were false. We are not convinced that the court below erred in denying the motion for an instructed verdict.

[4] No exception was taken to any portion of the instructions to the jury, and therefore this court is powerless to consider assignments directed to portions of the charge.

The judgment is affirmed.

(257 Fed. 552)

IOWA STATE TRAVELING MEN'S ASS'N v. LEWIS.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5234.

1. INSURANCE ⟹455—ACCIDENT INSURANCE—POLICY—CONSTRUCTION—"EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS."

   Death of insured from opening a pimple with an infected pin *held* the result of receiving a bodily injury through external, violent, and accidental means within the terms of an accident policy.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, External, Violent, and Accidental Means.]

2. INSURANCE ⟹456—ACCIDENT INSURANCE—POLICY—CONSTRUCTION—"OPEN WOUND."

   Where insured died as the result of opening a pimple with an infected pin, *held*, that the wound was an open one, etc., within the provisions of the policy exempting the insurer from liability for local or general infection, except when such infection results from a visible or open wound caused by external, violent, and accidental means.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action by Maude Lewis, as executrix of the last will and testament of John F. Bailey, deceased, against the Iowa State Traveling Men's Association. There was a judgment for plaintiff (248 Fed. 602), and defendant brings error. Affirmed.

John B. Sullivan, of Des Moines, Iowa (Sullivan & Sullivan, of Des Moines, Iowa, on the brief), for plaintiff in error.

Eugene D. Perry, of Des Moines, Iowa (Harley H. Stipp, Robert J. Bannister, and Vincent Starzinger, all of Des Moines, Iowa, and H. B. Bradbury, of New York City, on the brief), for defendant in error.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. This is an action to recover a death indemnity alleged to be due and payable by the plaintiff in error, hereafter defendant, to the estate of John F. Bailey, deceased. The case was heard by the trial court sitting without a jury upon the pleadings and a stipulation of facts. Judgment was rendered in favor of the defendant in error, hereafter plaintiff.

[1] Section 2, of article 6, of the contract sued on reads as follows:

"Whenever a member in good standing shall through external, violent, and accidental means receive bodily injuries which shall, independently of all other causes, result in death within ninety days from said injuries, the beneficiary named in his application for membership, or his heirs, if no beneficiary is named therein, shall be paid the proceeds of one assessment of two dollars upon each member in good standing, but in no case shall such payment exceed the sum of five thousand dollars, which shall be in full satisfaction of all liabilities to the said deceased member, his beneficiaries, heirs or legal representatives."

The facts in this case are the same as those in Interstate Business Men's Accident Association v. Maude Lewis, Executrix, 257 Fed. 241, this day decided. For the reasons given in the case mentioned we decide that the deceased came to his death as the result of receiving a bodily injury through external, violent, and accidental means within 90 days from the said injury. The defendant further pleaded the following section applicable to the contract sued on (article 6, § 6):

"The association shall not be liable to any member or beneficiary for any indemnity or benefit for accidental death * * * resulting wholly or partially, directly or indirectly, from any of the following causes, conditions or acts, or when the member is under the influence of or affected by any such cause, condition, or act, to wit: Disease, bodily infirmity, * * * local or general infection or joint inflammation (except when such infection or inflammation results from a visible or open wound caused by external, violent and accidental means), * * * intentional injuries inflicted by the insured. * * * Each of the foregoing causes, conditions or acts are expressly exempted from all the provisions of these by-laws granting to members or beneficiaries thereof benefits or indemnity."

[2] We are of the opinion that the scarf pin used by deceased made an open wound—that is, a wound unhealed and open to infection—caused by external, violent, and accidental means. The exception contained in the above section 6 contains no limitation as to how the in-

flammation or infection gets into the wound, whether by the deceased's own act or otherwise.

This case is within the exception of section 6, and the judgment below is affirmed.

(257 Fed. 554)

BALDWIN v. KINGSTON.

(Circuit Court of Appeals, Third Circuit. April 8, 1919.)

No. 2437.

BANKRUPTCY ⟹181—CONVEYANCE FOR WIFE'S SUPPORT—INADEQUATE CONSIDERATION.

Where the value of property transferred by a bankrupt to his wife was not disproportionate to the bankrupt's pecuniary obligation of support to her, in suit by his trustee against the wife to set aside the conveyance as in violation of the Bankruptcy Act, the equitable doctrine that, where the consideration for a conveyance is inadequate, the conveyance will be sustained only to the extent of the consideration actually given, has no application.

Appeal from the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

Suit by J. Wadsworth Baldwin, trustee in bankruptcy of Larue H. Kingston and William H. Burnett, individually and as copartners, against Etta C. Kingston. From a decree dismissing the bill (247 Fed. 163), the trustee appeals. Affirmed.

Andrew Van Blarcom, of Newark, N. J., for appellant.

Robert H. McCarter, of Newark, N. J., for appellee.

Before WOOLLEY, Circuit Judge, and THOMPSON and MORRIS, District Judges.

PER CURIAM. Larue H. Kingston made a conveyance through an intermediary to his wife. Upon a petition filed within four months thereafter, Kingston and his copartner, Burnett, individually and as copartners, were adjudicated bankrupts. The trustee in bankruptcy instituted suit to set aside the conveyance as being in violation of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585–9656]). After hearing upon bill, answer, and proofs taken orally before the District Court, a decree was entered dismissing the bill of complaint. 247 Fed. 163. From this decree the trustee appeals.

The assignments of error allege generally that the court erred in holding that the conveyance was not voluntary and was supported by a consideration; in finding that there was an agreement whereby the conveyance should be in satisfaction, whole or partial, of the wife's right to support; and in finding that the value of the property transferred was not so disproportionate to the bankrupt's pecuniary obligation to his wife as to justify the application of the equitable doctrine that where, under certain circumstances, the consideration for a conveyance is sufficiently inadequate the conveyance will be sustained only to the

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extent of the consideration actually given, and be declared voluntary and void as to the residue.

As our views on the questions presented by the assignments of error are in accord with those of the learned trial judge, we dispose of the case on his opinion, and direct that the decree below be affirmed.

(257 Fed. 555)

RENSSELAER & S. R. CO. v. DELAWARE & HUDSON CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 206.

COURTS ⟹297—FEDERAL COURT—JURISDICTION OF CASE INVOLVING INCOME TAX ON RAILROAD DIVIDENDS.

The Circuit Court of Appeals has no jurisdiction of a suit by one railroad company against another and the collector of internal revenue, to determine a liability for the income tax on cerfain dividends as between the two companies, where the controversy depends wholly on the construction of the lease executed by plaintiff railroad to defendant; both being citizens of the state of New York, whose courts may determine the controversy, unless the collector should remove the case under Judicial Code, § 33 (Comp. St. § 1015).

Appeal from the District Court of the United States for the Northern District of New York.

Suit in equity by the Rensselaer & Saratoga Railroad Company against the Delaware & Hudson Company, impleaded, and another. From a decree dismissing the bill, complainant appeals. Bill directed to be dismissed without prejudice against the named defendant.

Certiorari denied, 250 U. S. —, 39 Sup. Ct. 492, 63 L. Ed. —.

G. B. Wellington, of Troy, for appellant.

Walter C. Noyes, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The Rensselaer & Saratoga Railroad Company, a corporation and citizen of the state of New York, filed this bill in equity against the Delaware & Hudson Company, also a corporation and citizen of the state of New York, and Roscoe Irwin, collector of United States internal revenue for the Fourteenth district, praying that the collector defendant might be restrained from attempting to collect a balance of income tax due by the plaintiff for the year 1916, by seizure and sale of any of its property, and that he be required to collect the same of the defendant the Delaware & Hudson Company, and that the Delaware & Hudson Company be directed to pay the balance of said income tax due, and to pay any income tax that shall be levied hereafter against the plaintiff by charging the same pro rata to the plaintiff's stockholders and deducting the amount from the dividends which it has agreed to pay such stockholders. The collector made default, and the Delaware & Hudson Company moved to dismiss the bill on various

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

grounds not necessary to mention, which motion the District Judge granted.

Our decision in Rensselaer & Saratoga R. R. Co., v. Irwin, 249 Fed. 726, 161 C. C. A. 636, and the decision of the Court of Appeals of the state of New York in Rensselaer & Saratoga R. R. Co. v. Delaware & Hudson Co., 217 N. Y. 692, 112 N. E. 1072, which were the subject of discussion on the argument may be referred to. We see nothing in the latter decision to prevent the courts of the state of New York determining the controversy as to future dividends between the corporations and that with the collector too (if he should not remove the case under section 33 of the Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1096, Comp. St. § 1015]), as a new question; but as it depends wholly upon the construction of the lease executed by the Rensselaer & Saratoga Railroad Company to the Delaware & Hudson Company May 1, 1871, and both parties are citizens of the state of New York, we have no jurisdiction of the present suit.

The court below is therefore directed to dismiss the bill without prejudice against the defendant Delaware & Hudson Company.

(257 Fed. 556)

MIAMI CYCLE & MFG. CO. v. ALLEN.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3193.

1. ESTOPPEL ⟹68(4)—EQUITABLE ESTOPPEL—JUDICIAL PROCEEDING.
   Where defendant's tender was open to be interpreted as a cancellation of the patent license contract, and in preceding litigation complainant's assignor did so interpret the tender, and acted under that interpretation until selling his interest to complainant, *held*, that defendant was estopped from claiming its tender should have been construed as a rescission.
2. ESTOPPEL ⟹68(4)—JUDICIAL PROCEEDING—CHANGE OF THEORY.
   Where, on first trial, decree was rendered for complainant for royalties due under an exclusive patent license contract, on the theory that there had been a mutual cancellation, and that theory was urged by defendant on motion for rehearing on appeal from first decree, *held*, in view of subsequent surrender by assignee of original complainant of right to recover damages and profits from infringement by others, defendant cannot question the acceptance of the offer.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit by Herbert W. Allen, assignee of William Robinson, against the Miami Cycle & Manufacturing Company. From a decree for complainant, defendant appeals. Affirmed.

Walter B. Grant, of Boston, Mass., for appellant.

Leonard Garver, Jr., of Cincinnati, Ohio, and Cornelius C. Billings, of New York City, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and KILLITS, District Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

PER CURIAM. The question remitted to the court below by our per curiam opinion on the former appeal (Miami Co. v. Robinson, 245 Fed. 556, 569, 158 C. C. A. 22), was decided by that court, and is now brought before us by this appeal. A mere statement of our conclusions must suffice. It will be sufficiently intelligible, by reference to the former opinion.

The letter and transfer of September 29, 1914, and the acceptance by Robinson, are now claimed by his assignee to have constituted a cancellation in præsenti of the contract of July, 1908, operating only against royalty thereafter accruing, and are claimed by the Miami Company to have been a rescission ab initio, or else to have been wholly ineffective because tendered as the latter and accepted as the former, without meeting of minds. For convenience, we denominate the first of these two conflicting theories as "cancellation" and the second as "rescission." The documents are not necessarily inconsistent with an intent to tender rescission, but the whole record does not justify that interpretation.

The reasons supporting this conclusion are: (a) There is nothing improbable in supposing that the company would be willing to lose what it had invested and take its chances on being compelled to pay royalty until September 29, if it could escape future royalty and get rid of the relations with Robinson. (b) No grounds for rescission existed or had been claimed; and the letter states no claim of cause for rescission, but only alleges breaches which would justify cancellation. (c) The letter demands no repayment of the consideration paid (except remotely under the name of damages for breach). (d) The company's amended answer did not allege rescission, but only "renouncement," and did not ask relief appropriate to rescission. (e) Upon the trial, both parties and the court treated the transaction as a cancellation, and neither by assigned error or by brief or argument in this court did the company complain; on the contrary, it acquiesced in the theory that, if it was liable at all, its liability ceased on September 29. (f) Even in the company's application for rehearing in this court, upon the former appeal, the theory of cancellation seems to be depended upon, and the theory of rescission is, at best, only suggested. Not until the court below, after remand, was asked to enter final decree, was the defense of rescission ever distinctly and clearly made.

[1] Such circumstances as indicate—and there are some which do—the intent to tender rescission are, we think, overborne by these facts just recited. In any event, it is clear that the tender was—at best for defendant—ambiguous, and was open to be interpreted as a cancellation. Robinson did so interpret it, he accepted it under such interpretation, and he continued to act under that interpretation during the remainder of the litigation, and, apparently still acting thereunder, sold his interest to Allen. During all this time, the company was bound to know that its offer was capable of being considered a cancellation, and that Robinson was so considering it and was acting accordingly thereon. Upon the ordinary principles of estoppel, the company cannot now claim that its offer should receive the other construction.

[2] During the progress of this litigation, each party has assumed positions inconsistent with its former action, and it is impossible to give effect to all these shifts. By its application for rehearing on the former appeal, the company impressed upon us the injustice of compelling it to continue bound by the contract after cancellation; now it wishes us to find that there had been no cancellation and that it is still bound. It calls our attention to the fact that, in opposing this application, Robinson's counsel denied that he had accepted the offer of September 29. Perhaps this denial was not seriously intended; perhaps it can be explained because of some misunderstanding; but, in any event, it was wholly ineffective. When Robinson, at the end of the first trial, claimed a decree upon the theory that his right to royalties continued until September 29, and then ceased because this cancellation had been made, and when he obtained the decree based on that theory, and successfully maintained it on appeal, he thereby accepted the offer as upon that theory, there was a cancellation by mutual consent, and the subject was closed. It became Robinson's duty to retransfer whatever of value, if anything, remained with him and to which he was not entitled. This he (by his assignee) has now done, by surrendering the right to recover damages and profits accruing before September 29 from infringement by others. This was belated, but the statute of limitations has not run, and nothing has been lost.

From these considerations, all of which appear without dispute, it is evident that the decree below was right in its substantial result; and it is affirmed.

(257 Fed. 593)

FIRST NAT. BANK OF FAIRBANKS v. NOYES.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3142.

1. ESTOPPEL ⟹88(2)—EQUITABLE ESTOPPEL—WHAT CONSTITUTES.
That a director of a national bank signed his name to reports to the Comptroller of the Currency, representing branches maintained by the bank to be separate institutions, *held*, as the bank knew all the facts in relation thereto, and did not act to its detriment in reliance on the reports, not to estop the director from asserting, in a suit by the bank to recover against him because of excessive loans to a branch, that such branches were part of the bank itself.

2. BANKS AND BANKING ⟹253—BRANCH BANKS—WHAT ARE.
In an action by a national bank against a former director to recover on account of excessive loans to alleged separate institutions, etc., *held*, that such institutions were branches maintained by the bank to purchase gold dust, so statements to the Comptroller showing the condition of accounts between the bank and branches were not notice to the director of loans to the branches, or of loans made to borrowers under authority of the bank.

3. BANKS AND BANKING ⟹253—DIRECTORS—LIABILITY.
A director of a national bank, who was not familiar with banking business, *held* not negligent because he did not examine into advances made by the bank to branches which it maintained, and no recovery can be had on ground of excessive loans by the branches, where the president and majority stockholder of the bank represented all sums sent to the branches were for purchase of gold dust.

4. BANKS AND BANKING ⟹253—DIRECTORS—LIABILITY—DIVIDENDS.
In an action by a national bank against a former director to recover, on the theory that a dividend had improperly been declared, *held*, that the declaration of the dividend, which was at the suggestion of the Comptroller of the Currency to wind up branches of the bank, was not improper, and no liability could be predicated thereon, as practically the whole of the dividend was immediately transferred to the bank by the stockholders.

5. BANKS AND BANKING ⟹253—DIRECTORS—LIABILITY.
Where a national bank seeks to recover against a director for a loss resulting from the director's violation of a duty imposed by the National Banking Act, proof of something more than negligence is required, and there must be proof that the violation was in effect intentional.

6. BANKS AND BANKING ⟹253—DIRECTORS—LIABILITY.
Directors of a national bank owe a common-law duty to exercise ordinary care and prudence in the administration of the affairs of the bank, and they should not be shielded from liability for want of knowledge of wrongdoing, if that ignorance is the result of gross inattention; but they cannot be held responsible for the wrongful act of other directors, nor to intimately know to whom credits are given.

7. BANKS AND BANKING ⟹254—DIRECTORS—LIABILITY.
In an action by a national bank against a director to recover for various losses, including improper extension of credits, claimed to have resulted from the director's neglect, evidence *held* insufficient to show that the director was liable, either at common law or under the National Banking Act.

Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit by the First National Bank of Fairbanks against F. G. Noyes. From a decree for defendant, complainant appeals. Affirmed.

The appellant, a national banking association of Fairbanks, Alaska, brought suit against the appellee, who had been one of the directors of the bank during the period between September 9, 1907, and March 5, 1909, on five causes of action, the first of which was to recover the sum of $25,722.27 as damages sustained by the appellant on account of an excessive loan made in violation of the provisions of the National Banking Act by the directors of the bank to what was then known as the "S. A. Bonnifield Bank." The second was to recover from the appellee $5,627.93 damages sustained by the appellant by the act of the appellee and other directors in declaring a dividend in violation of the provisions of said act, and thereby appropriating the same to their own use. The third was to recover the sum of $7,168.22 as damages on account of an excessive loan, made in violation of the provisions of the act, to what was known as the "Bank of Cleary." The fourth and fifth were to recover the sums of $5,100 and $7,800 damages sustained on account of excessive loans made in violation of the provisions of the act to John W. Corson and Theo. Witte, respectively. The appellee in his answer denied any violation on his part of any of the provisions of the act respecting excessive loans or illegal dividends, and alleged that the S. A. Bonnifield Bank and the Bank of Cleary were not separate and distinct banks, but were only branches of the appellant, belonging to and a part of it.

On the pleadings and the evidence the court made substantially the following findings of fact:

That the capital stock of the bank is $50,000, consisting of 500 shares, of which the appellee, during the period while he was a director, owned 10 shares, and that at that time Samuel A. Bonnifield, the president, and F. G. Manley, a director, owned practically all of the stock of the corporation. That from April 29, 1907, to October 15, 1909, the said Bonnifield maintained and carried on a banking business on Dome Creek, Alaska, under the name of the S. A. Bonnifield Bank, and from April 5, 1906, until February 13, 1909, he maintained and carried on, on Cleary Creek, Alaska, another banking business under the name of the Bank of Cleary. That these banking institutions were separate institutions from the First National Bank, and were established before the appellee became a director. That the appellee was not a banker, and he believed that the Bank of Cleary and S. A. Bonnifield Bank were part of the First National Bank, and was not guilty of negligence, or of any culpable intent, in believing that these so-called banks were not borrowers of the funds of the appellant, but held those funds subject to the control and disposal of the appellant, as if said funds had been held at the place of business of the appellant. That loans were made to Manley in excess of the amount permitted by law, to the knowledge of said Bonnifield and Manley, but without the knowledge, consent, or acquiescence of the appellee, and no loss resulted to the appellant from said loans.

That the so-called S. A. Bonnifield Bank and the so-called Bank of Cleary were established by Bonnifield for the purpose mainly of purchasing and collecting gold dust from the miners in the vicinity thereof, and for the use and benefit solely of the appellant, and Bonnifield thereafter caused to be transferred and kept on the books of the Dome Creek and Cleary offices doubtful debts and excessive loans of the appellant, and drew checks upon his account in those offices without having any funds to his credit, all of which was done without the knowledge, participation, or assent of the appellant, who believed that those two offices were used only for purchasing and collecting gold dust, and for the accommodation of the miners. That in the latter part of August, 1908, the appellee learned that these offices were irregular, and not permitted by law, and thereafter he and Hurley, the cashier, did all in their power to close said offices, until they were finally closed. That the loan register of the appellant shows no entry of loans or discounts for those offices, nor does the interest account of the appellant show that any interest was ever charged to those offices for moneys sent thereto. That the accounts between said offices and the appellant were open accounts, changed from day to day, by reason of entries of credits and debits

caused by accounts transferred, and cash sent by the appellant to those institutions, and gold dust sent back therefrom to the appellant, and the same accounts retransferred from said offices to the appellant, and by the cashing of checks by the three offices, one for the other.

That the credit given by the appellant on its books to the so-called Bonnifield Bank on August 18, 1908, for $39,563.12, being the amount of the Tanana Commercial Company account, was given without the knowledge, participation, or assent of the appellee, and was given by Hurley, the cashier of appellant, for the purpose of winding up and closing the affairs of the Bonnifield Bank, in consequence of directions received from the Comptroller of the Currency. That said account belonged to and was the property of the appellant, and the purpose of the cashier in making said credit entries was to show on the books the true condition of the appellant and its accounts. That of the loans and advances made by the appellant to the Tanana Commercial Company, $14,500 was advanced by Bonnifield prior to the time when the appellee became a director, $632.91 was usurious interest, $5,158.61 was for an overdraft permitted to the Tanana Commercial Company without the knowledge, participation, or assent of the appellee, and $19,271.60 was the balance of a loan made between September 27 and December 2, 1907, to the Tanana Commercial Company by Bonnifield, as president of the appellant, and in pursuance of an agreement between him and the Commercial Company prior to the time when the appellee became a director, and was made on the security of certain goods and chattels, but without the knowledge or assent or participation of the appellee.

That the appellee did not on August 18, 1908, or at any time, knowingly or at all cause to be made, or participate or assent to the making of, any credit upon the books of the appellant from the Bonnifield Bank of the sum of $39,563.12, or any sum, nor did he assent to the making of any charge by the Bonnifield Bank against the appellant of said sum, nor did he at any time have any knowledge of the value of the goods or stock of merchandise or book accounts of the Tanana Commercial Company. That the moneys drawn out of the funds of the appellant and of the so-called Bonnifield and Cleary Banks by Bonnifield, during the time that he was president and manager, were the moneys and property of the appellant, and the securities taken by him in his own name through either of said banks were the securities and property of the appellant, and the assets of the so-called Bonnifield and Cleary offices were the accounts and securities of the appellant. That in 1907, Bonnifield drew from the funds of the Bonnifield Bank, May 1, $20,000, June 3, $6,056, June 7, $14,000, and credits were made to his account, so that the Bonnifield Bank showed a balance debit of $20,595.15 on its books. That between the dates of Bonnifield's overdraft and the closing up of the Bonnifield Bank, profits had been made by the latter and remitted to the appellant, resulting in a debit balance of only $6,103.01. That the Bonnifield and Cleary Banks had no source of income, and the general expenses of operating the same were borne by the appellant in funds furnished by it. That no loss has been caused to the appellant in consequence of establishing and maintaining either the Bonnifield or the Cleary Bank, or in consequence of money sent to said banks. That said banks have purchased large amounts of gold dust for the benefit of the appellant, and delivered the same at cost purchase price, so that the appellant has realized out of the gold dust so purchased by said banks more than sufficient to equal the amount of the balances claimed in the complaint to have been lost by reason of the operations in the Bonnifield and Cleary Banks.

That upon February 13, 1909, the directors of the appellee caused a dividend of $40,000 to be declared upon the shares of the capital stock of the appellant, and on the same day they credited the Bank of Cleary with $39,840 of the dividend so declared. That at that time the capital stock, surplus, accrued interest, undivided profits, and other assets belonging to the appellant were in excess of $150,000, and the amount out of which a dividend could be declared lawfully was in excess of $40,000, and the appellee and the other directors did not know that there were bad debts amounting to $48,450, but believed that the net profits then on hand and available for

dividends, deducting losses and bad debts, was in excess of $40,000, and that the capital stock of the appellant was not impaired by declaring the dividend. That the declaration of that dividend was made solely for the purpose of closing up the affairs and office of the Bank of Cleary, in pursuance of directions from the Comptroller of the Currency, and upon declaring the same certificates of deposit were made to the order of the stockholders for their respective shares, which certificates were immediately indorsed by them and not cashed, but turned over to the appellant, save and except the dividend on 2 shares, amounting to $160; but the appellee contributed the entire amount of his dividend for the purpose indicated. That in declaring the dividend the appellee did not assent to or participate in any withdrawal of any portion of the appellant's capital, and that in fact by the dividend the capital of the appellant has not been impaired, nor has it sustained any damage.

That the loan to Carlson was made by the appellant upon his note for $5,700 of date October 29, 1906, of which $700 was usurious interest, and further usurious interest was added thereto, amounting to $583.68, and said note, with the usurious interest, was transferred a year later to the Bank of Cleary, where Carlson had also an overdrawn account. That on September 15, 1907, Carlson's account at Cleary was $26,760.57, which by October 29, 1907, was reduced to $22,690.01, and on that day it was further charged with the amount of the note, making the total $28,973.69, and on October 30, 1907, the total amount was transferred to the appellant, and $20,000 thereof was charged to the personal account of Bonnifield, and subsequently paid by him. That the unpaid balance of Carlson's account, amounting to $8,973.69, included $1,283.68 of usurious interest, to which further usurious interest amounting to $1,184.53 was added, making the sum total $10,158.22, for which he gave his note to Bonnifield, which was subsequently indorsed to the appellant. That $2,990 has been collected on account of the note, and after deducting that sum and usurious interest Carlson's account was shown by the evidence to have been decreased down to $4,700.01, which was less than Carlson owed to the appellant at the time when the appellee became a director. That no loss suffered by the appellant by reason of the transactions with Carlson was caused by the act or omission of the appellee, and the loans to Carlson were made by Bonnifield, and without the knowledge or participation of the appellee. That he never knew or consented to any of the credit entries or transactions between the Cleary Bank and the appellant in the matter of the Carlson account. That in fact the Carlson account was neither imaginary nor worthless, or fictitious or uncollectible.

That between July 17, 1908, and August 18, 1908, the cashier of the appellant, without the appellee's knowledge or consent, discounted bills drawn by J. W. Corson to the amount of $11,450, and bills of exchange drawn by one McDonald, amounting to $2,750. That Manley, then a director of the appellant, represented to the cashier that said bills of exchange were drawn in good faith against existing values. That the appellee never acquired knowledge of the said transactions until more than a month after they had been consummated. That the appellant has not been damaged by any act of the appellee in discounting and cashing said drafts. That between January 14, 1909, and March 5, 1909, the appellant loaned to Theodore Witte, without the knowledge or consent of the appellee, $10,500, and without his knowledge or consent permitted Witte to overdraw to the sum of $1,203.43. That on March 8, 1909, the overdraft was paid by Witte, and the appellant was not damaged in consequence of any participation or assent of the appellee to said loan or overdraft.

That the appellant, through its directors and officers, knew on September 5, 1907, and its stockholders knew on January 7, 1908, that the appellee was not a banker, and had no experience in the banking business, and was not able to understand any complicated system of bookkeeping, such as bank books, nor any of the transactions therein recorded, and they at no time informed him of the true condition of the appellant or of its affairs with the Cleary and Bonnifield Banks, and that the appellee was not then and has not since been lacking in diligence in not being informed of the true state of the affairs of the appellant or of the other so-called banks. That he

never, during the time while he was director, knowingly permitted to be made or assented to the making of any loans or advances or overdrafts to any person or persons in excess of the amount permitted by the National Banking Act (Act June 3, 1864, c. 106, 13 Stat. 99). That the amount which the appellant could lawfully loan between July 17, and August 13, 1908, to any one person, firm, or corporation, was $11,500. That on May 8, 1909, all the capital stock of the appellant was sold to E. T. Barnett and W. H. Parsons, who thereafter sold the same to R. C. Wood and John L. McGinn, who now own each 230 shares thereof. That at the time when Barnett and Parsons purchased the capital stock they did so with full knowledge of the affairs and conditions of the bank, and the price paid by them therefor did not contemplate any liability attached to and existing against the appellee for any act of his during his directorate. That when Wood and McGinn took an option from Barnett and Parsons to purchase the stock, they had full knowledge of the affairs and conditions of the appellant.

As a conclusion of law the court found that the appellee was not liable to the appellant in any sum upon any of the causes of action set forth, and a judgment was entered dismissing the action.

John L. McGinn, McGowan & Clark, and A. R. Heilig, all of Fairbanks, Alaska, and W. H. Metson, F. C. Drew, J. A. MacKenzie, and Miss E. H. Ryan, all of San Francisco, Cal. (Curtis Hillyer, of San Francisco, Cal., of counsel), for appellant.

Roy V. Nye, of Monrovia, Cal., and De Journel & De Journel, of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant assigns error to the findings of the court as contrary to the evidence, to the refusal of the court to make findings as requested by the appellant, and to the conclusions of law because unsupported by the findings. The five causes of action are grouped in two classes. The second is for damages for the declaration of an illegal dividend. The others are based on loans made in excess of the amount permitted by the National Banking Law. As to the first and third causes of action for damages for the so-called loans to the Bonnifield and Cleary branches, the appellant relies upon reports to the Comptroller of the Currency, which were signed by the appellee, to show that the appellee had knowledge of the excessive amount of the loans. This contention is based on the theory that those branches were in fact banks separate and distinct from the appellant bank, and it is said that this is conclusively established by the finding of fact of the court below from which finding no appeal has been taken. It is also contended that the appellee is estopped to deny that the Bonnifield and Cleary branches were separate entities, for the reason that he, together with five other directors, signed his name to reports to the Comptroller of the Currency, representing them to be separate institutions, and because the appellant, relying thereon, brought the present suit. The question of estoppel may be disposed of in few words. The appellant knew all the facts in regard to the so-called branches, and it knew the exact nature of its own dealings therewith, and it has not been injured by the appellee's signature to the reports to the Comptroller, nor has it acted thereon to its own detriment.

[2, 3] It is true that the court below made a finding that the Bonnifield and Cleary institutions "were separate institutions from the First National Bank." That is not a finding of fact, however, but a conclusion of law. This is shown, first, by the opinion of the court below, in which it was said of these branches:

> "They have every indication of being a part of the First National Bank. No characteristic is lacking."

But the court proceeded to say that, owing to the provision of law that a national bank cannot establish branch banks except in the manner provided by statute, "we must conclude that these banks must be held to be separate from the First National Bank."

It is shown, second, by the facts in regard to the relation of the appellant to the two branches as set forth in the findings of the court below, which prove beyond question that the Bonnifield and Cleary offices were part and parcel of the appellant bank, and that it was so generally understood by the public. Those offices were established by the appellant. They had no organization as banks and no capital stock. They acted under the directions of the appellant. They made loans out of funds furnished by the appellant, and only as authorized by the appellant. Their principal business was to purchase gold dust with the appellant's funds and forward the same to the appellant, and to receive for transmission to the appellant gold dust to be deposited to the credit of depositors who had accounts with the appellant. Each office was in charge of a manager or agent appointed by the appellant. The branch offices reserved no profits to themselves. All that they did was for the benefit and profit of the appellant. The appellant authorized a bank in Seattle and a bank in New York to cash drafts drawn by the appellant's agent at Bonnifield, and to charge the same to the appellant. It gave like authority to the Seattle bank and to a bank of San Francisco to cash drafts drawn by the agent at Cleary. The appellant conducted these gold dust purchasing agencies in competition with two other banks of Fairbanks, which had offices at the same places and for the same purposes. The Dome and Cleary Creek agencies sent statements to the appellant of their condition and their transactions, and the latter took and retained possession of all their books and records when the agencies were closed, and it still retains the same. In brief, the so-called Bonnifield and Cleary Banks were but agencies belonging to and operated by the appellant, and were not separate banking institutions.

The statements, therefore, found in the reports to the Comptroller, showing the condition of the accounts between the appellant and its respective agencies, and charging the agencies with moneys appearing in the form of indebtedness from those branches to the appellant, were not evidence of loans to the agencies, and were not notice to the appellee of loans to borrowers made under the authority of the appellant. There is no ground for charging the appellee with negligence in not discovering that excessive loans were being made at the local branches on Dome Creek and Cleary Creek. There was nothing on the books of the appellant at its place of business in Fairbanks to show

that loans were made to borrowers at either of those branches. It is true that Bonnifield and Manley borrowed from those branch offices sums of money in excess of the amount which the bank was permitted to loan. The appellee did not know this, however, and he was informed by Bonnifield and Manley that all money sent out to the branch offices was for the purpose of purchasing gold dust. The appellee had no reason to doubt this, and he should not be charged with negligence for his failure to go out to Dome Creek and Cleary Creek to examine the local books. A complete answer to the whole contention is that the appellee is not charged in the complaint with participation in excessive loans made by the local branch offices. The charge is that as director he participated in making loans to the branch offices. As we have seen, no such loans were made.

[4] The declaration of the dividend which is the basis of the second cause of action was but a transaction on the books of the appellant for the purpose of closing up the Cleary agency and transferring to the appellant at its bank at Fairbanks the assets of the agency. It was a dividend in form only, for the whole amount of the dividend declared, except $160, was immediately transferred by the stockholders to the bank. Again, the condition of the business of the appellant at that time, as the court below has found, was such as to justify the declaration and payment of the dividend, when account is taken of certain assets of the Cleary agency, then in control of the president of the bank, and subsequently turned over to the bank. We find no merit in the technical objection that those assets could form no basis for the declaration of the dividend, for the reason that they were not then collected, or that they had been assets of the Cleary agency.

The fourth and fifth causes of action require but brief consideration. The appellant admits that the only question arising upon these two causes of action is whether the appellee was chargeable with knowledge of the loans. There is nothing in the record to show that the appellee had or was chargeable with such knowledge. The loan to Witte resulted from cashing Witte's drafts. This was the act of the president and cashier of the bank, and the appellee had no notice of it or participation in it. The loan to Corson was likewise made without the knowledge or consent of the appellee, and in fact, as the court below found, it was not a loan in excess of the amount which the bank was permitted to loan when the usurious interest reckoned therein is eliminated.

[5-7] We are led to the inquiry: What is the measure of the appellee's legal liability to the bank of which he was director in causes of action such as are here brought before us? The appellee contends that the only rule of liability is that which is defined in Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002, where the court held that the National Banking Act itself affords the exclusive rule by which to measure the right to recover damages from directors based upon loss resulting solely from their violation of the duty expressly imposed upon them by a provision of the act, and that under that act proof of something more than negligence is required, and that there must be proof that the violation was in effect

intentional. In that case the charge against the directors was that they had made false reports of the condition of the bank, and the decision was controlled by the consideration that in making and publishing the official reports of the condition of the bank the directors were acting in obedience to the National Banking Act, and that, where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed in the statute is the exclusive test of liability. That decision was followed and its doctrine was applied in Williams v. Spensley, 251 Fed. 58, 163 C. C. A. 308, where the suit was against directors on their liability for declaring dividends voted out of the capital stock, and where the court said:

"Appellant contends that the liability of a national bank director for voting and declaring dividends out of the capital is an absolute liability, and no question of good faith, diligence, or knowledge on the part of a director that such dividends may impair the bank's capital is involved. This contention must be rejected, both on principle and authority. See Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002."

The appellant in its brief admits that this is not an action founded upon the common-law liability of the appellee, but observes that under the facts developed at the trial the appellee was liable for willful neglect of his duty as director, within the doctrine of the decision of this court in McCormick v. King, 241 Fed. 737, 154 C. C. A. 439, where we held that the statutory liability of directors of a national bank, as prescribed in section 5239, Rev. St. (Comp. St. § 9831), is the measure of the right of recovery against them for loss resulting solely from their violation of the express provisions of the statute, but that that does not exclude their common-law liability for negligence in the management of business of the bank in violation of their oath of office which results in loss to its creditors and stockholders.

In the present case, in the first, third, fourth, and fifth causes of action, the appellant expressly counts upon violations of that provision of the National Banking Act which prohibits loans in excess of the amount permitted by the act. As to those causes of action we think it clear that the rule of liability is that which is defined in Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002. But if we were to apply to all of these causes of action the common-law rule of liability recognized by this court in McCormick v. King, there is still nothing in the evidence to show that the appellee has been guilty of negligence in the management of the bank which has resulted in loss to its creditors or stockholders. In Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, the court announced the rule of liability of directors, saying that directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of the bank, but that they shall not be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention, and that they cannot be held responsible for losses resulting from the wrongful acts of other directors, unless the loss is the consequence of their own neglect of duty. In the McCormick Case this court said:

"No one would contend that a director must look into details of management, or keep closely in touch with routine matters, or know intimately to whom credits are given."

The appellee became a director of the bank in consequence of the insistence of the other directors. He was not a banking man. He knew nothing of the banking business, and when he discovered evidences of irregularity in the management of the bank's business he resigned his office. At times he protested against the method in which the business was done. He urged that the branch agencies be closed. In declaring the dividend which gives rise to the second cause of action, the directors acted under the advice of McGinn, the regularly retained attorney for the bank, who is now a director and one of the principal stockholders of the corporation which brings this suit.

We find no error. The judgment is affirmed.

(257 Fed. 601)

HERMAN v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3234.

1. WAR ⟹4—ESPIONAGE ACT—PUBLICATION OF FALSE CIRCULAR—INTERFERENCE WITH SUCCESS OF MILITARY FORCES.

In a prosecution for publishing a false circular to interfere with the operation and success of the military and naval forces of the United States, certain correspondence between defendant and other Socialists, appearing after declaration of a state of war with Germany, *held* admissible as showing defendant's state of mind and his intent in making public his circular.

2. WAR ⟹4—ESPIONAGE ACT—PUBLICATION OF FALSE CIRCULAR—EVIDENCE.

In a prosecution for publishing a false circular with intent to interfere with the operation of the military forces of the United States, certain correspondence between defendant and another before the declaration of a state of war between the United States and Germany *held* admissible, as showing defendant's mental attitude at a time not too remote from the time he committed the act charged.

3. WAR ⟹4—ESPIONAGE ACT—FALSE CIRCULAR—EVIDENCE.

In a prosecution for publishing a false circular with intent to interfere with the operation of the military forces of the United States, certain pamphlets found in defendant's possession, referring to the alleged plutocratic origin of the war with Germany, etc., *held* admissible to show defendant's state of mind and intention, as were copies of receipts found in defendant's office for money sent by correspondents to pay for copies of the pamphlets.

4. WAR ⟹4—ESPIONAGE ACT—FALSE CIRCULAR—EVIDENCE.

In a prosecution for publishing a false circular with intent to hinder the operation of the military forces of the United States, testimony of two persons to a conversation with defendant after the declaration of a state of war between the United States and Germany *held* admissible to show defendant's mental attitude, though he was not on trial for his opinions or for being a pacifist or a Socialist.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied October 14, 1919.

5. CRIMINAL LAW ⟹763, 764(17)—INSTRUCTION—COMMENT ON EVIDENCE.

In a prosecution for publishing a false circular with intent to hinder the operation of the military forces of the United States, instruction that evidence of the purchase and circulation of other literature by defendant, and of his statements and correspondence to show his condition of mind, had been permitted only to indicate the trend of his thought with relation to the particular act charged, *held* not improper as a comment on the evidence or as tending to confuse the jury.

6. WAR ⟹4—ESPIONAGE ACT—FALSE CIRCULAR —INSTRUCTION.

In prosecution for publishing a false circular with intent to hinder the operation of the military forces of the United States, an instruction that it was immaterial what Lloyd George said during the Boer War, what William Pitt said during the Rebellion, what George Washington said with relation to pending legislation, or what Roosevelt had said prior to the time involved, *held* proper.

7. WAR ⟹4—ESPIONAGE ACT—FALSE CIRCULAR—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a conviction of the state secretary of the Socialist party of a state for having published a false circular with intent to interfere with the operation of the military forces of the United States.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Emil Herman was convicted of interfering with the operation and success of the military and naval forces of the United States, and he brings error. Affirmed.

The plaintiff in error was found guilty upon two counts of an indictment, each of which charged: That continuously between April 6, 1917, and April 19, 1918, he published and exhibited in a described room or office in Everett, Wash., a printed circular in the following words: "The Military Ideal. Young Man: The lowest aim in your life is to be a good soldier. The 'good soldier' never tries to distinguish right from wrong. He never thinks, never reasons; he only obeys. If he is ordered to fire on his fellow citizens, on his friends, on his neighbors, on his relatives, he obeys without hesitation. If he is ordered to fire down a crowded street when the poor are clamoring for bread, he obeys and sees the gray hairs of age stained with red and the life tide gushing from the breast of women, feels neither remorse nor sympathy. If he is ordered off as one of a firing squad to execute a hero or a benefactor, he fires without hesitation, though he knows the bullet will pierce the noblest heart that ever beat in human breast. A good soldier is a blind, heartless, murderous machine. He is not a man, he is not even a brute, for brutes only kill in self-defense. All that is human in him, all that is divine in him, all that constitutes a man, has been sworn away when he took the enlistment oath. His mind, his conscience, aye his very soul, are in the keeping of his officer. No man can fall lower than a soldier—it is a depth beneath which we cannot go. Young Man Don't Be a Soldier—Be a Man!!" That said office during said period was visited by a large number of men, their names being unknown to the grand jury, who were between the ages of 21 and 45 years, fit and qualified for military services, and who were citizens of the United States. That every statement in said circular was false and untrue, as the defendant well knew. The intent charged in one count was that the acts so charged were done with the intent to interfere with the operation and success of the military and naval forces of the United States, and in the other count the intent was alleged to be to promote the success of the enemies of the United States. On the conviction on these two counts the defendant was sentenced.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Austin Lewis, of Oakland, Cal., for plaintiff in error.

Robert C. Saunders, U. S. Atty., and Clarence L. Reames, Sp. Asst. Atty. Gen., and Hinman D. Folsom, Jr., all of Seattle, Wash., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] Error is assigned to the admission in evidence of certain correspondence which was found in the defendant's office. The correspondence was in substance the following:

Schmidt wrote on April 6, 1918, to the defendant, sending his resignation as a member of the Socialist organization, expressing patriotic sentiments and disapproval of the attitude of the Socialist party, to which, on April 12, 1918, the defendant answered, stating that Schmidt was wrong in his attitude toward the Socialist party program and principles.

Maurer wrote to the defendant on May 9, 1917, referring scornfully to a patriotic parade which he had witnessed, and saying:

"They have the audacity to ask us to take a gun and defend this land of the free and the brave."

To that letter the defendant replied on May 10, 1917, expressing similar sentiments in regard to patriotic parades.

On April 11, 1918, Salmon wrote to the defendant, stating that he had been sentenced to nine months in jail for refusing to answer the questionnaire, stating that he had appealed the case, and saying.

"The questionnaire is the first step in an extensive program to militarize America. If we oppose militarism in its inception, it cannot grow."

On April 17, 1918, the defendant answered, stating that Salmon's cause was a worthy one.

All this correspondence was introduced for the purpose of showing the state of mind of the defendant and the intention with which he posted the printed circular which is set forth in the indictment. For that purpose they were clearly admissible.

The correspondence with Gast differs from the other correspondence, in that it occurred in February, 1917, before the declaration of war between the United States and Germany. Gast wished to have a circular printed and distributed to prevent enlistment in the army of the United States, which the government was then soliciting, and the defendant approved the scheme. We are unable to see that the admission of this evidence was error for which the judgment should be reversed. It also had its value as showing the mental attitude of the defendant at a time not too remote from the time when he committed the act which is the subject of the indictment.

[3] Error is assigned to the admission in evidence of certain pamphlets found in the defendant's possession, copies of which he was shown to have distributed. One of them, entitled "The Menace of Militarism," refers to the mighty ones, the masters in the land, as having turned militaristic and developed a jingoism of their own, more vicious, because more unjustifiable, than that of the Germans, and

speaks of "the plutocratic oligarchy which controls the United States to militarism." Another was entitled "Mental Dynamite." On the front page it shows a picture of the hands of a soldier striking a bayonet through the hands of labor. It contains this sentence:

"The bayonet is a stinger made by the working class, sharpened by the working class, nicely polished by the working class, and then patriotically thrust into the working class by the working class, all for the employer class."

Another pamphlet was entitled "The Great Madness." It contains many statements similar to the following:

"The entrance of the United States into the world's war on April 6, 1917, was the greatest victory that the American plutocracy has won over the American democracy since the declaration of the war with Spain in 1898."

These pamphlets, like the correspondence above referred to, were admitted for the purpose of showing the state of mind and the intention of the defendant, and for that purpose they were admissible. The same may be said of the copies of receipts found in the defendant's office, receipts for money sent by various correspondents to pay for copies of the pamphlets above referred to.

[4] Nor do we find error in the admission of the testimony of Black and Swale, each of whom testified to a conversation with the defendant after the entry of the United States into the war. These conversations were admitted expressly for the purpose of showing the intent of the defendant, and in instructing the jury the court carefully limited the testimony to the question of intent. It is true, as counsel for defendant urges, that the defendant was not being tried for his opinions or for being a pacifist, or for being a Socialist, but for publishing the circular described in the indictment with the criminal intent therein alleged. But the evidence to which exception was taken all tended to show the mental attitude of the defendant and had its bearing upon the question of his intent and was admissible for that purpose. Kettenbach v. United States, 202 Fed. 377, 120 C. C. A. 505, and cases there cited. In Kirchner v. United States (Bulletin No. 174) 255 Fed. 301, 166 C. C. A. 471, the court, in answering a similar contention to that which is here made said:

"In admitting this evidence the trial court distinctly and more than once advised the jury that this testimony was admitted only as bearing on the intent of the defendant in making the statements set out in the indictment. The evidence in question does have a tendency to prove that the defendant, if he made the statements charged, made them with the intent charged."

[5, 6] The defendant assigns error to the instruction of the court to the jury that the evidence of the purchase and circulation of other literature by the defendant, and his conversations and statements and correspondence, to show his condition of mind, had been permitted only for the purpose of indicating the trend of his thought with relation to the particular act charged in the indictment. This instruction is not open to the objection, which is now advanced, that it was a comment upon the evidence and tended to confuse the jury. Also without merit is the assignment of error to that portion of the charge in which the court said to the jury:

"It is immaterial what Lloyd George said during the Boer War, what William Pitt said during the Rebellion, what George Washington said with relation to legislation then pending, or what Jack London said, * * * or what Theodore Roosevelt has said prior to this time."

It appears elsewhere that what was thus said by the court was in answer to an argument made on behalf of the defendant that the persons so named had been permitted to criticize their government. It cannot be seen that the defendant was in any way prejudiced by the instruction. What the court said was true, and was not improperly said.

[7] The contention that the judgment is not supported by evidence cannot be sustained. There was no request for an instructed verdict for the defendant. Notwithstanding that fact, we have examined the evidence, and we find that, in addition to the contents of the posted circular which speak for themselves, the defendant, as state secretary of the Socialist party of the state of Washington, had charge of the office in which the circular was posted, and that during all the time between June 15, 1917, and May 6, 1918, the circular was posted upon a bookcase in the office, and that daily during that period the office was visited by a number of men between the ages of 18 and 45, many of them between the ages of 21 and 31 years, who were qualified and subject to duty in the military and naval forces of the United States. These facts, together with the evidence showing the intent of the defendant, were amply sufficient.

The judgment is affirmed.

(257 Fed. 605)

WELLS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3186.

1. CRIMINAL LAW ⟹1032(6), 1044—APPEAL—INDICTMENT—WAIVER.
   The objection that an indictment is bad for duplicity is waived, where defendant does not test the same by demurrer, motion to quash, or motion that an election be required, and the appellate court will not consider such objection.

2. CONSPIRACY ⟹34—TO HINDER EXECUTION OF "LAW."
   In view of Const. art. 1, § 7, a joint resolution of Congress made and approved on April 6, 1917, declaring a state of war to exist between the United States and Germany, is a "law," within the scope of Criminal Code, § 6 (Comp. St. § 10170), denouncing the offense of conspiracy to oppose by force the authority of the United States, or by force to hinder and delay the execution of any law thereof.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law.]

3. INDICTMENT AND INFORMATION ⟹71—CERTAINTY.
   The true test of an indictment is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged and sufficiently informs the defendant of what he must be prepared to meet and, in case other proceedings are taken

against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

4. CONSPIRACY ⟹43(11)—INDICTMENT.
An indictment charging that defendants, in violation of Criminal Code, § 6 (Comp. St. § 10170), conspired together to oppose by force the authority of the United States, and by force to prevent, hinder, and delay the execution of the joint resolution of Congress of April 6, 1917, declaring a state of war to exist with Germany, which in the second count specifically enumerated various acts, the execution of which defendants conspired to prevent, hinder, and delay, *held* to state with sufficient definiteness the manner in which the offense was to be committed.

5. CRIMINAL LAW ⟹1158(1)—REVIEW—QUESTION FOR JURY.
It is for the trial court to say whether the evidence is sufficient to carry case to the jury.

6. CONSPIRACY ⟹48—TO HINDER EXECUTION OF LAW—JURY QUESTION.
In view of National Defense Act, §§ 57, 79 (Comp. St. §§ 3041, 3044q), as well as Act Jan. 21, 1903, as amended by Act May 27, 1908, *held*, in a prosecution wherein defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), by force to prevent, hinder, and delay the execution of the joint resolution of Congress declaring a state of war to exist with Germany, etc., that the evidence was sufficient to take the case to the jury.

7. CONSPIRACY ⟹45—EVIDENCE—ADMISSIBILITY.
Where defendants were charged with conspiring in violation of Criminal Code, § 6 (Comp. St. § 10170), to prevent, hinder, and delay the execution by force of the joint resolution declaring a state of war to exist with Germany, etc., by issuing circulars against conscription, the admission of a resolution introduced by one of the defendants at a meeting where organized workers demanded of the government exemption from military service of those who had conscientious objections to the war was proper, having a tendency at least to show defendant's attitude of mind toward conscription.

8. CONSPIRACY ⟹45—EVIDENCE—ADMISSIBILITY.
Where defendants were charged with violation of Criminal Code, § 6 (Comp. St. § 10170), for conspiring by force to hinder, delay, and obstruct the execution of the joint resolution declaring a state of war with Germany, etc., evidence that one of the circulars they issued was found on the front porch of the witness' home, which was within a block of the boundary lines of the military reservation, *held* admissible to show distribution of the circulars.

9. CRIMINAL LAW ⟹1170(1)—HARMLESS ERROR—EVIDENCE—EXCLUSION.
Where defendants were charged with violation of Criminal Code, § 6 (Comp. St. § 10170), for conspiring by force to hinder, delay, and obstruct the execution of the joint resolution declaring a state of war to exist with Germany, etc., and a defendant was permitted to testify fully concerning an organization against militarism of which he was a member, *held*, that the exclusion of what was done at local branches of the organization regarding conscription could not have harmed him or the other defendants.

10. CONSPIRACY ⟹45—EVIDENCE—ADMISSIBILITY.
Where defendants were charged with violating Criminal Code, § 6 (Comp. St. § 10170), for conspiring by force to obstruct, hinder, and delay the joint resolution declaring a state of war to exist with Germany, and the prosecution relied on circulars advocating resistance to conscription, a letter written in reply to one written by defendant by a congressman, showing that he was opposed to conscription and offered to show defendants' good faith, was incompetent.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

11. CRIMINAL LAW ⟹1043(2)—APPEAL—OBJECTION—OFFER OF PROOF.
An exception to the sustaining of an objection to a question to a witness cannot be considered, where it was not stated what the answer would be; the court not being advised as to the relevancy of the matter sought to be elicited.

12. WITNESSES ⟹259—TESTIMONY FROM STENOGRAPHIC TRANSCRIPT.
A transcript of stenographic notes of an interview may be used by the one who took the notes only to refresh his memory.

13. CRIMINAL LAW ⟹1169(1)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.
Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and obstruct by force laws of the United States, including the joint resolution declaring a state of war to exist with Germany, the admission of a transcript of stenographic notes of an interview with one of the defendants *held* harmless; the matter being fully covered by other witnesses.

14. CRIMINAL LAW ⟹829(1)—INSTRUCTIONS—REFUSAL.
The refusal of requested instructions covered by the charge given is not error.

15. CRIMINAL LAW ⟹1038(1), 1056(1)—APPEAL—OBJECTIONS AND EXCEPTIONS TO CHARGE.
The appellate court will not ordinarily look into any objections to the charge, unless they are timely made, and exceptions are regularly saved to the rulings thereon.

16. CRIMINAL LAW ⟹822(11)—INSTRUCTIONS AS A WHOLE—PRESUMPTION.
Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and prevent by force the execution of the joint resolution of Congress declaring a state of war to exist with Germany, etc., and it appeared that they issued a circular against conscription, an instruction that defendants were presumed to know the law, and cannot shield themselves behind ignorance of the law, when considered with the charge as a whole, *held* not erroneous.

17. CRIMINAL LAW ⟹822(11)—CONSPIRACY—INSTRUCTIONS AS A WHOLE—PRESUMPTION.
In a prosecution for conspiracy in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and prevent by force the execution of laws of the United States, such as the joint resolution of Congress declaring a state of war to exist with Germany, etc., a charge that every person is presumed to intend the natural consequences of his own act *held* correct, when considered with the charge as a whole; the criminality of the act not depending on a particular intent, etc.

18. CRIMINAL LAW ⟹822(7)—CONSPIRACY—INSTRUCTIONS AS A WHOLE.
Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to prevent by force the execution, etc., of laws of the United States, as the joint resolution declaring a state of war with Germany, and it appeared that they issued a circular against conscription, an excerpt from the charge, that the effect of the circular could not be neutralized or limited by any motive or intent not connected therewith, when considered with the charge as a whole, *held* correct.

19. CRIMINAL LAW ⟹814(1)—SEDITION—CONSPIRACY—INSTRUCTIONS.
Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), by force to prevent, hinder, and delay the execution of the joint resolution declaring a state of war to exist with Germany, etc., and they issued circulars against conscription, a charge on freedom of speech, referring to riots, *held* not open to attack, as being inapplicable; the court stating therein that it referred to riots merely for illustration.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

20. CRIMINAL LAW ⟹1137(3)—APPEAL—INVITED ERROR—INSTRUCTION.
Where defendants requested a charge dealing with freedom of speech, they cannot attack a charge thereon as irrelevant; the giving of the same being invited.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Hulet M. Wells and others were convicted of conspiracy in violation of Criminal Code, § 6, and they bring error. Affirmed.

The plaintiffs in error, defendants below, were indicted by two counts, charged with conspiracy under section 6 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. § 10170]). The first count charges that the defendants, on April 25, 1917, conspired together and with sundry other persons "to oppose by force the authority of the United States, and by force to prevent, hinder, and delay the execution of a law of the United States; that is to say," the defendants, naming them, did "conspire, confederate, and agree together, and with divers and sundry other persons to the grand jurors unknown, by force to prevent, hinder, and delay the execution of the joint resolution of Congress of the United States made and approved on the 6th day of April, A. D. 1917 [40 Stat. 1, c. 1], then and there declaring a state of war to exist between the United States and the Imperial German government, and directing and authorizing the President of the United States to employ the entire military and naval forces of the United States and the resources of the government to carry on war against the Imperial German government, and to then and there oppose by force the authority of the United States and the authority of the President of the United States in carrying into force and effect the provisions of the law then existing which related to the armed military and naval forces of the United States, and to then and there by force prevent, hinder, and delay the execution of such acts of Congress enacted after the adoption of said resolution declaring war between the United States and the Imperial German government, hereinabove referred to, for the purpose of carrying into execution the plan and purpose of said resolution; it then and there being the purpose and intention of the said defendants, and each of them, together with such other persons as they might, or could, induce, incite, and encourage to cooperate with them in their plan, and to join their said conspiracy to oppose by force the authority of the United States, and to prevent, hinder, and delay the execution of the said joint resolution of Congress declaring war hereinabove referred to, together with such other laws as then existed or as might thereafter be enacted in pursuance of said joint resolution of Congress declaring war, and it then and there was the further purpose, plan, and object of the said defendants, and each of them, to prevent by force the proper organization of armed military and naval forces of the United States, and the proper disposition of said force under and by virtue of the authorities of the United States in conducting said war so declared and resolved for by the said Congress of the United States."

The allegations of the second count are of similar import, except that they are more specific as to the laws, the execution of which it is alleged the defendants conspired by force to prevent, hinder, and delay. These laws, as specified, are: First, the joint resolution of the Senate and House of Representatives declaring war between this country and Germany; second, the act of Congress approved June 3, 1916 (39 Stat. 166, c. 134), entitled "An act for making further and more effectual provision for the national defense, and for other purposes," special reference being had to sections 57, 59, and 111 of said act (Comp. St. §§ 3041, 3043, 3045); and, third, section 4 of the act of Congress approved January 21, 1903, entitled "An act to promote the efficiency of the military and for other purposes" (32 Stat. 775, c. 196), as amended by section 3 of the act of Congress approved May 27, 1908, entitled "An act to further amend the act entitled 'An act to promote the efficiency of

the militia and for other purposes,' approved January 21, 1903" (35 Stat. 399, c. 204). And in relation to these laws it is further alleged: "It then and there being the purpose and intention of the said defendants, and each of them, together with such other persons as they might or could induce, incite, and encourage to co-operate with them in their plan, and to join their said conspiracy, by force to prevent, hinder, and delay the duly authorized officers, agents, and representatives of the United States from putting into effect and executing the said laws hereinabove mentioned, and from calling forth and bringing into the military service of the United States persons subject and liable to service thereunder under the provisions of said laws, and to prevent, hinder, and delay by force the mobilization, organization, control, direction, and disposition of the armed military and naval forces of the United States in conducting said war against the Imperial German government."

The cause went to trial upon a plea of not guilty, resulting in a conviction of all the defendants. Prior to trial there was no demurrer or other plea or motion interposed to the sufficiency or regularity in form or otherwise of the indictment. The defendants prosecute a writ of error from the judgment entered upon their conviction.

Winter S. Martin and Wilson R. Gay, both of Seattle, Wash., for plaintiffs in error.

Robert C. Saunders, U. S. Atty., Clarence L. Reames, Sp. Asst. Atty. Gen., and Ben L. Moore,. Asst. U. S. Atty., all of Seattle, Wash.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). The first question presented here is whether the indictment by each count charges two or more distinct offenses. It is unnecessary at this time to analyze the indictment, read in connection with the statute under which it is drawn (section 6, Criminal Code), to determine whether or not it contains the statement of two or more separate and distinct offenses. It is sufficient to say that the objection was only raised by a motion to dismiss at the close of the government's case, on the ground that the indictment does not state facts sufficient to constitute an offense against the defendants, and a further motion at the close of the case for a directed verdict discharging the defendants, for the same reason.

[1] The objection that an indictment is bad for duplicity is waived by going to trial, unless previously tested by demurrer, motion to quash, or motion that the prosecution be required to elect between the offenses charged. The rule is thus stated in 12 Cyc. 762:

"The objection that an indictment is bad for duplicity should be made by demurrer, by motion to quash, or by motion that the prosecution be required to elect between the offenses, and a failure to do so waives the objection and it cannot be raised by motion in arrest of judgment."

See, also, United States v. Bayaud (C. C.) 16 Fed. 376.

The waiver intercepts any later objection made to the form of the indictment that it is bad for duplicity, and the defendants were precluded from interposing it at the time they sought to do so. For this reason, the court will not now further consider it.

[2] It is next contended that the indictment is not sufficient, for reasons following: First, that the joint resolution of Congress declaring

war against the Imperial German government is not a law, within the purview of section 6 of the Criminal Code; and, second, that both counts are bad, because lacking in specific and definite allegations showing in what manner the offenses were to be committed.

Article 1, § 7, of the Constitution, prescribes the requisites to be observed by which a bill introduced in either house of Congress shall become a law. It must pass both houses and be presented to the President. If he approves it, it becomes a law. If he returns it with his veto, it must be to the house in which it originated. The section then proceeds as follows:

"If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

"Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."

While not passing upon the question directly, the Supreme Court has considered and treated joint resolutions as having the effect of law. For instance, the court, in considering a joint resolution suspending the operation of an act of Congress, says, in United States ex rel. Levey v. Stockslager, 129 U. S. 470, 475, 9 Sup. Ct. 382, 384 (32 L. Ed. 785):

"It [the joint resolution] had all the characteristics and effects of the act of March 2, 1867 [the act which the resolution suspended], which became a law by the approval of the President. Until Congress should further order, the operation of the act of March 2, 1867, was by the joint resolution effectually suspended."

So in Fourteen Diamond Rings v. United States, 183 U. S. 176, 184, 22 Sup. Ct. 59, 62 (46 L. Ed. 138), Mr. Justice Brown, in a concurring opinion with the Chief Justice who rendered the opinion of the court, speaking of the function of a joint resolution, says:

"While a joint resolution, when approved by the President, or, being disapproved, is passed by two-thirds of each house, has the effect of a law (Const. art. 1, § 7), no such effect can be given to a resolution of either house acting independently of the other."

The eminent Justice cites with approval 6 Op. Atty. Gen. 680, wherein Attorney General Cushing holds that:

While "joint resolutions of Congress are not distinguishable from bills, and * * * have all the effect of law, * * * separate resolutions of either house of Congress, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the President or heads of departments."

The purpose of the resolution in question was weighty; it was designed to proclaim that a state of war existed between this government and Germany. It was designed to have, and by the intendment of Congress without question did have, the same effect and potency as if war had been declared by a regular act of Congress; otherwise, that body would, we may reasonably assume, have made the declaration by a regularly adopted act. We think that the resolution having the effect of law must be considered a law, within the meaning of section 6 of the Criminal Code.

[3, 4] Referring to the objection that the indictment fails to state definitely in what manner the offenses were to be committed, it is our opinion that the indictment itself, in both counts, completely answers it. We need not here repeat the language. It will be sufficient to call attention to the allegations of the purpose and intention of the alleged conspirators, which were to oppose by force the authority of the United States, to prevent, hinder, and delay the execution of the joint resolution of Congress declaring war, and to prevent by force the proper organization of armed military and naval forces of the United States, etc. This as to the first count. The second is equally explicit. The word "force" has a well-defined meaning, and it was not essential to the protection of the defendants, in their right to be so informed of what they were accused of doing as to enable them to concert their defense, that the pleader go further and state the particular manner in which the force was designed to be applied.

The true test of an indictment, says the Supreme Court, is, "not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Cochran and Sayre v. United States, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630 (39 L. Ed. 704). The principle has been applied by this court in Sheridan v. United States, 236 Fed. 305, 310, 149 C. C. A. 437.

The rule is especially applicable at the stage of the proceedings in which the question of the sufficiency of the indictment was raised here for the first time. Applying the rule, it is clear that the present indictment reasonably conforms to the requirement of the law. It serves to warn the defendants of what they are called upon to meet at the trial, and puts them into adequate possession of the facts charged to enable them properly to concert their defense. The indictment is therefore sufficient.

[5, 6] The next question presented for consideration is whether the trial court committed error in refusing to grant defendants' motion for a directed verdict, on the ground that the testimony does not show the commission of the offense charged. The testimony is all in the record, and it is for the court to say whether it is sufficient to carry the case to the jury for their determination.

In the trial court's charge to the jury, the two counts of the indictment were consolidated and treated as one offense. To this manner of

treating the case there seems to have been no objection, by either the government or the defendants. Proceeding upon this theory, the particular charge against defendants is that they conspired to oppose by force, and to prevent, hinder, and delay, the execution of the joint resolution of Congress of April 6, 1917, declaring that a state of war existed between the United States and the Imperial German government, authorizing the President to employ the entire naval and military forces of the United States and the resources of the government, and pledging the resources of the country for bringing the conflict to a successful termination; also the National Defense Act of June 3, 1916, section 57 of which provides that:

"The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or who shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age, and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the naval militia, and the unorganized militia." Comp. St. § 3041.

And section 79:

"If for any reason there shall not be enough voluntary enlistments to keep the reserve battalions at the prescribed strength, a sufficient number of unorganized militia shall be drafted into the service of the United States to maintain each of such battalions at the proper strength." Comp. St. § 3044q.

And also the act of January 21, 1903, as amended by the act of May 27, 1908, which authorizes the President, whenever the United States is in danger of being invaded by a foreign nation, to call forth the state militia to repel such invasion.

Keeping this statement in mind as a premise, we will give attention to the evidence. Let us emphasize, before proceeding, that force is an essential element of the offense, and likewise in the charge, and that mere solicitation or entreaty, without a purpose of applying or using force to accomplish the ends sought to be attained, is without the intendment of section 6 of the Penal Code, under which the indictment is drawn.

In the latter part of April and early in May, 1917, meetings were assembled in Seattle, Wash., under the auspices of an association of persons known as the "No Conscription League." At these meetings there was prepared and adopted by the league a circular entitled "No Conscription, No Involuntary Servitude, No Slavery." Twenty thousand of these circulars were printed, and persons attending the meetings circulated them in certain parts of the city, going from house to house and leaving them as they passed along. The circular reads as follows:

"'Neither Slavery, nor INVOLUNTARY SERVITUDE, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.'

"The above is a part of the organic Constitution of the United States. The President and Congress have no authority to set it aside. That can only be done by a majority vote of the Legislatures of three-fourths of the separate states. For the President and Congress to do it is to usurp the powers of autocrats and if unresisted means the abandonment of democracy and the destruction of the republic.

"We, signing this, are native-born citizens, within the age limit set for the first compulsory draft. They will make an army of us and send us to

compel you to enter the second draft, and some more of you to enter the third draft and so on until freedom is dead. Wake up! Stand by us now, for when we have become an army we will have ceased to think and we will shoot you if told to shoot you! Just so it is expected that we will shoot and kill our brothers in other lands and that we will die to restore the rapidly vanishing values to the investments of Wall Street bankers escaping service themselves—a plutocracy whose good fortunes we do not share, but for which we have suffered enough.

"Resist! Refuse! Don't yield the first step toward conscription. Better to be imprisoned than to renounce your freedom of conscience. Let the financiers do their own collecting. Seek out those who are subject to the first draft! Tell them that we are refusing to register or to be conscripted and to stand with us like men and say to the masters: 'Thou shalt not Prussianize America!'

"We are less concerned with the autocracy that is abroad and remote than that which is immediate, imminent and at home. If we are to fight autocracy, the place to begin is where we first encounter it. If we are to break anybody's chains, we must first break our own, in the forging. If we must fight and die, it is better that we do it upon soil that is dear to us, against our masters, than for them where foreign shores will drink our blood. Better mutiny, defiance and death of brave men with the light of the morning upon our brows, than the ignominy of slaves and death with the mark of Cain, and our hands spattered with the blood of those we have no reason to hate.

"SEATTLE BRANCH NO CONSCRIPTION LEAGUE, P. O. Box 225.

"Where is it written in the Constitution—that you may take the children from their parents—and compel them to fight the battles of any war in which the folly or the wickedness of the government may engage?"

The testimony tends to show that the defendant Wells was present at two or more of these meetings, and took part in discussions pertaining to the circular. He took the copy to the printer and had it printed, corrected the proof, and paid for the printing, part of it from his own funds, and part through collections made at one of the meetings. He also directed the delivery of the printed circulars at the hall where a later meeting was held, and himself distributed some of the circulars. Sadler was present at at least one of the meetings, that of May 11, 1917, and took part in the discussions along with Wells. The "No Conscription" circulars were on the table in the assembly room at the time, and a number of persons took them away for distribution, but that Sadler took any of them away with him does not seem to be confirmed. Morris Pass attended two or more of the meetings, and at one acted as secretary, collected part of the money to pay for printing the circulars, and turned what he collected and that which came into his hands for that purpose over to Wells. He also distributed some of the circulars. Joe Pass was present at one or two of the meetings, took part in the discussion respecting the circular, and tacitly assented to its distribution. We have not attempted a survey of all the testimony adduced at the trial.

The defendants contend that the purpose of the circular was to oppose the passage of the conscription act, then pending in Congress, peaceably and without the use of force in any way, and the testimony for defendants seems to support the view that the discussions at these meetings took that turn. If force was to be employed, the fact must be deduced from the wording of the circular and the activities of the

defendants in procuring its adoption and distribution among the people in Seattle. What was said in the discussions that took place pertaining to the nature and character of the document to be adopted has not been shown, except in a general way, and no other language of a seditious nature has been shown to have been uttered by the defendants, or any of them, unless the resolution that was introduced by Wells at the Labor Temple in Seattle, and adopted, demanding exemption from military service on the ground of conscientious scruples, can be so construed. We consider the inquiry, however, aside from the effect and purpose of this resolution.

Attention should be directed more particularly to the wording of the latter clauses of the circular beginning with "Resist! Refuse!" It will thus be seen that the language urging resistance to conscription is very strong, breathing defiance to the constituted authorities, and, considering along with it the energy displayed in procuring the adoption and wide distribution of the circular, there would seem to be scope for reasonable men to draw the inference that it was intended, by those who were instrumental in its preparation and distribution, that force should be employed, if requisite, against the carrying into effect of the declaration of war by Congress, in pursuance of which Congress was proceeding to put the Selective Draft Act upon the statute, and to oppose by force the authority of the President in putting into execution the law respecting the militia, as referred to in the indictment, and the laws themselves carrying such authorization. We think, therefore, the evidence was sufficient upon which to submit the cause to the jury. It was not necessary to show that force was actually employed, but only that there was a conspiracy entered into that contemplated the employment of force, as a means to the accomplishment of a common purpose to oppose the execution of a law of the United States, or the authority of the government to prosecute the war.

[7] Objection was interposed to the admission of a resolution that was introduced by Wells, on May 23, 1917, at a meeting of the Central Labor Council in the city of Seattle, wherein organized workers, among other things, demanded of the government exemption from military service of all those who had conscientious objections to the war, as prejudicial. It had a tendency to show Wells' attitude of mind towards the Conscription Act, at least, and was admissible for that, if for no other purpose.

[8] Another objection was interposed to the admission of the testimony of one Fraser, to the effect that he found one of the circulars on the front porch of his home, within a block of the boundary line of the Ft. Lawton military reservation, and that he showed it to a Mrs. Knight, also as prejudicial to defendants. It was proper to show the extent to which the circulars had been distributed, and this evidence was pertinent to that purpose.

[9] While the defendant Wells was on the witness stand, he was asked:

"What steps were taken by the local branches, by yourself and other members, with reference to opposing the Conscription Act?"

The government having objected, witness was not permitted to answer, and this is assigned as error. The local branches referred to were branches of a national organization of Socialists known as the "American Union against Militarism." Wells had testified that he had taken part in the movement, and had attended meetings of the local branch at different places in Seattle. The meetings were held before the declaration of war. The witness continued:

"The whole purpose of the society and of the defendant was to get before the people the opinions offered by those who were favorably disposed in their point of view to this movement to place it before Congress. This society continued its agitation up to the time it was seen that the country was about to get into the war. From that time until the declaration of war they confined their efforts to trying to bring about an honorable avoidance of the war. After war was declared by the United States, the society ceased all opposition to the war itself. After the war was declared, the organization kept together, because it was thought there would be many occasions which would arise from time to time which would require the liberty of the people to be safeguarded. It was thought that conscription would quite likely become one of the issues, and that the society and its members should endeavor to prevent the enactment of such a law."

Wells having testified fully touching the organization known as the "American Union against Militarism," it was not essential to inquire in detail as to what was done at the local branches and by the members thereof touching the Conscription Act. He was permitted to explain fully what part he took in opposing that act, and the inquiry sought to be made could not appreciably help him or the other defendants. Otherwise, the issue sought to be injected into the trial was collateral in its scope, and irrelevant.

[10] It further developed that the defendant Wells, in his opposition to the adoption of the Conscription Act, wrote letters to members of Congress, and especially to Congressman Dill, who wrote defendant in reply. Counsel sought to introduce the letter from Dill, but was not permitted by the court to do so. The declared purpose in introducing the letter was to show that Dill agreed with Wells in his views on conscription, and that Wells was acting in good faith in opposing the measure. If it was relevant for him to show that others agreed with him, it should have been done by the sworn testimony of other witnesses. It was wholly incompetent to prove the fact by unsworn ex parte statements of the kind.

[11] Anna Louise Strong, a witness for defendants, was asked as to the purpose of the local branch of the general organization of the Union against Militarism. She was not permitted to answer, over the objections of the government, and error is assigned. It was explained by defendants' counsel that the question was preliminary, for the purpose of leading up to other questions. The exception is without merit, for the reason that it is not stated what the witness would have testified in answer to the question, and the court is not advised as to the relevancy of the matter sought to be elicited.

[12, 13] Frank B. Greene, who was a stenographer and engaged in the Secret Service department of the United States, being called as a witness for the government, testified that he, with others, interviewed defendants Joe and Morris Pass in New York, and that at the time he

took what was said at the interview in shorthand, and subsequently transcribed it. He related what the Pass brothers said to him, which testimony was admitted in evidence without objection. Joe and Morris Pass were witnesses in their own behalf, and while on the stand (and especially Joe Pass) disputed the correctness of Greene's testimony touching parts of the interview in New York. Greene was recalled in rebuttal, and interrogated as to Joe Pass' rendition of the interview, and the government was thereupon permitted, over objection, to introduce the transcript of the notes of the interview in evidence. The action of the court in this respect is also assigned as error. Technically the transcript should not have gone in, because the notes of the interview could be used by Greene only for one purpose, namely, that of refreshing his memory in case he was unable to testify from his independent recollection, and not as substantive testimony of what was said there. But the field of the interview seems to have been quite fully covered by Greene and the Pass brothers, and for this reason it is not apparent wherein the defendants have been injured by the introduction of the notes themselves. The error was therefore harmless. The exception saved to the refusal of the court to permit Greene to testify as to what the notes contained was without merit, as the notes showed for themselves what they contained.

We come now to the instructions of the court. The defendants, through their counsel, requested the court to give certain instructions, which were prepared and requested to be given in a former case. In that case two of the defendants here were indicted by five counts. Count 1 charged a conspiracy to violate section 211 of the Penal Code (Comp. St. § 10381); count 2 the same; count 3 to violate section 6 of the Penal Code, by conspiring to prevent, hinder, and delay the execution of the joint resolution of Congress of April 6, 1917; count 4 substantially the same; and count 5 charged seditious conspiracy, under section 6 of the Penal Code, to prevent, hinder, and delay the execution of the Selective Draft Act of May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. 1918, §§ 2044a–2044k]). Some of such requested instructions were applicable in the present trial, but some were not.

[14] The first alleged error insisted upon is the court's refusal to give requested instructions 1 to 6, inclusive. Some of these are inapplicable here for any purpose. Those that are applicable have been disposed of by what has previously been said in this opinion. They relate to the sufficiency of the evidence to make a case for the jury.

The refusal to give a number of other requested instructions is assigned as error. Those insisted upon in the brief of counsel relate to requested instructions 8, 11, 13, 15, 16, 19, 20, and 21. As it relates to requested instructions 8, 11, 13, 15, and 16, we are persuaded that they are, so far as they state the law, adequately covered by the general instructions of the court. As to requested instruction 11, we shall have more to say when we reach the exceptions to parts of the general instructions. Requested instructions 19, 20, and 21 relate to the presumption of innocence, and the legal necessity of proving the defendants guilty beyond a reasonable doubt. They might properly have been given, and we think ought to have been. They are covered in

their essential features by the general instructions, but not so specifically or incisively. Yet, upon a careful reading of the entire instructions of the court, it is obvious that defendants have sustained no substantial injury by the court's refusal to give them.

We will notice now such assignments of error pertaining to the general charge as are properly predicated upon exceptions regularly and adequately saved thereto. Reference to the bill of exceptions will show that but three exceptions were even attempted to be saved to parts of the general instructions. These relate to what the court said, first, with reference to the use of force; second, with respect to the presumption of knowledge of existing laws; and, third, pertaining to freedom of speech.

[15, 16] The court will not ordinarily look into any objections to the charge, unless they are timely made and exceptions regularly saved to the rulings of the court respecting them. This eliminates consideration of all defendants' assignments of error relative to the general instructions, except such as are based upon the three exceptions above noted. The first two of the exceptions saved are directed to the following portions of the charge:

"If you believe or if you have reasonable doubt as to whether the 'No Conscription' circular set out in the indictment and admitted in evidence did not purpose to oppose by force or incite others to oppose by force and hinder and delay the President in the execution of the joint resolution of Congress, then, of course, you will not consider it in that connection. But if you believe beyond a reasonable doubt that the purpose and effect of the circular was to incite others by force to oppose, hinder, and delay the execution of such resolution, then such defendants who entered into such conspiracy would be guilty. In this connection I think I should say that the defendants are presumed to know the law, and cannot shield themselves behind ignorance of the law. The law requires that all persons know what the law is. You are also instructed that every person is presumed to intend the natural consequences or results of his acts deliberately or knowingly done.

"As stated, the indictment charges the defendants with conspiring to oppose by force the authority of the United States, and to hinder and delay the execution of its laws. You are instructed that this is an element which must be established by the testimony on the part of the government by the same degree of proof.

"Force need not be actual physical force manifested by the defendants, but must be such conduct, either acts, statements, invitations, or solicitations, the evident purpose of which is to incite others to the use of forcible resistance in hindering or delaying the government of the United States in the execution of its laws. It is not essential that the object of the conspiracy should actually have been accomplished, or that force should actually have been used. Nor is it essential that the conspirators should have agreed upon the precise method of employing force or the weapons or instruments of such force. If a conspiracy was formed, and the use of force was the natural or necessary means of accomplishing the object of the conspiracy, and if its use was necessarily incident to the carrying out of the plan of the conspiracy, whether that force should be used by the defendants, or only by those persons who should be induced to co-operate with them, then the defendants would be guilty of the offense charged. Nor can the effect of the circular be neutralized or limited by any motive or purpose or intent not communicated with the circular. Nor could what Webster or any one else said enter into this issue, or limit the effect of the circular, if the natural and reasonable conclusion to be deduced from the circular in evidence and what was done with it was to incite by force opposition to the law of the United States as charged.

"I think I should say in this connection, in view of the suggestions during the trial and argument, that you are not concerned in this case whether the war is right or not. We are at war now. There are only two sides to the war. One side is in favor of this country; the other side is against it. The policy of the government has been declared and established, and no person can by force do anything that will hinder or delay the government in carrying out that policy set out and defined in the resolution referred to in the indictment. The defendants are not charged with being against or in favor of the war, but with conspiracy by force to oppose, hinder, or delay the government of the United States in the execution of the resolution passed by the Congress with relation to the war and in carrying it to a successful termination."

The criticism directed to the first of these instructions is to that portion whereby the court told the jury that the defendants were "presumed to know the law and cannot shield themselves behind the ignorance of the law. The law requires that all persons know what the law is." It is urged that the publication of the circular in question could not be construed as inherently felonious per se, and that in criminal law every person is not presumed to know the law to such a degree as to impose upon him a felonious purpose when in fact he might have been ignorant of the law and have had no such purpose. Counsel discusses the publication of the circular as if it were directed against the Conscription Act, which had not then been adopted by Congress. Such was not the case, and such was not the theory of the prosecution, or the court. Indeed, the court elsewhere plainly told the jury that the conspiracy, if any were formed, could not be made to offend against the Conscription Act of May 18, 1917. The court gave no such intimation as that the publication of the circular was felonious per se. What the court said to the effect that defendants were presumed to know the law is common knowledge, and, when construed in connection with the entire charge, is not susceptible of the construction that counsel are disposed to place upon it.

[17] Further criticism is directed to the expression of the court that "every person is presumed to intend the natural consequences of his own act." This is a common instruction given in cases where the deliberate act of the defendant, by natural consequence, is to do an injury to another or to the government, and, as applied to this case, it has relation to the deliberate publication of a seditious circular. It is urged that the instruction was prejudicial, and that, while it is correct as an abstract legal proposition, it should not have been given in this case, citing Hibbard v. United States, 172 Fed. 66, 96 C. C. A. 554, 18 Ann. Cas. 1040, in support of the argument. That case, however, is one for devising a scheme with intent to defraud, and is clearly distinguishable from one like this. To show this, we need only quote from the opinion of the court on rehearing:

"The error consists in applying it [the instruction] to a case wherein, apart from the intent, the act is colorless; color being thereby imparted, not to the intent by the color of the act, as the law implies, but to the act itself by the color borrowed from the intent. In cases like this where the act itself is, apart from the intent, colorless, the color of the intent must be proven as any other element of criminality is proven."

The present case is not one of that nature. It should be said that here the court elsewhere told the jury that this presumption was not conclusive, but probatory in character, and should be considered with all the other elements disclosed by the testimony in the cause. There was no error in giving the instruction.

[18] As it relates to the second part of the instructions above quoted, the criticism is directed to that particular clause where the court said:

"Nor can the effect of the circular be neutralized or limited by any motive or purpose or intent not communicated with the circular."

Standing alone, of course, this excerpt does not express the full or explicit meaning which the court designed to convey; but when read in connection with the clause following, and especially with what the court said on the subject of intent, the criticism loses its potency. Nor is the criticism of the court's instruction relative to the force essential to be manifested by defendants entitled to greater weight. The instruction on that subject is, in our opinion, a clear exposition of the law as applicable.

[19] The third reserved exception relates to the court's instruction respecting the subject of freedom of speech. It is covered by the fifteenth assignment of error. The objection goes to the incorporation into the court's instruction of what was said by the writer of this opinion, in instructing a jury in another case, in explaining the constitutional right of freedom of speech, and especially to the part of the instruction running as follows:

"But a citizen may not use his tongue or his pen in such a way as to inflict legal injury upon his neighbor or another. Nor has any person the right, under the guaranty of freedom of speech, to shape his language in such a way as to incite discord, riot, or rebellion, because such action leads to a breach of the peace, and disturbs good order and quietude in the community.

"But when his criticism extends, or leads by willful intent, to the incitement of disorder and riot, or to the infraction of the laws of the land or the Constitution of this country, or with willful purpose, to the resistance and obstruction of the due execution of the laws by the proper authorities, it overleaps the bounds of all reasonable liberty accorded to him by the guarantee of the freedom of speech, and this because the very means adopted is an unlawful exercise of his privilege."

It is urged that, while what was repeated from the writer's instruction was applicable in the case of riot, rebellion, or breach of the peace, it could not be applied so broadly as to be suited to the case at bar. The court's attention was called to this feature of the instructions, when it had concluded, and it took occasion to say that—

"Any reference in the instructions with relation to inciting to riot was simply given as a general definition of the term (freedom of speech), so that you will understand it, and you will understand that the reference should only apply to the charge in the indictment; that is, the conspiracy to, by force, hinder and delay the government as charged."

As thus explained, the criticism is untenable.

[20] Another objection to the entire instruction is that the question of freedom of speech is not involved in the issues of the case. Counsel,

however, cannot complain of this, if otherwise irrelevant, as they invited the instruction by their requested instruction No. 11.

Finding no error in the record, the judgment of the trial court will be affirmed.

(257 Fed. 620)

SHIDLER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3272.

1. WAR ⟹4—ESPIONAGE ACT—OFFENSES.

Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), *held* to denounce three offenses: First, the willful making or conveying of false reports while the United States is at war, with the intent to interfere with the operation or success of military and naval forces, etc.; second, the attempt to cause insubordination, disloyalty, or mutiny in the military and naval forces of the United States; and, third, the willful obstruction of the enlistment service of the United States, to the injury of the service or the United States—it being unnecessary to the consummation of the first two offenses that the United States be injured.

2. ARMY AND NAVY ⟹40—ESPIONAGE ACT.

Assuming that defendant might be loyal, though he characterized the Draft Act as unjust, and stated that he would fight conscription, yet, if he made the statement with evil mind, intending to bring about insubordination, disloyalty, and refusal of duty in the military service, he was guilty of a violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), and in a prosecution based on such statement, defendant's acts, speech, and state of mind are matters for consideration in determining whether he was guilty.

3. WAR ⟹4—ESPIONAGE ACT—EVIDENCE.

In a prosecution under the Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), for the making of false statements to the effect that the war was nothing but a capitalists' war, etc., with intent to promote the success of Germany, with which the United States was at war, a copy of the address of the President of the United States to Congress, made a few days before that body declared war, setting forth the causes for the declaration of war, *held* admissible in evidence.

4. CRIMINAL LAW ⟹371(1)—EVIDENCE—OTHER OFFENSES—STATE OF MIND—ESPIONAGE ACT.

In a prosecution under Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), for making false statements with the intention of promoting the success of Germany, with which the United States was at war, evidence of statements made by defendant prior to the declaration of war was admissible, where limited to the question of the defendant's state of mind at the time he uttered the statements charged.

5. ARMY AND NAVY ⟹40—ESPIONAGE ACT—OFFENSE.

The mere utterance of seditious words in the presence of a person subject to military duty under the Selective Service Law (Comp. St. 1918, §§ 2044a–2044k), if intended to induce insubordination, disloyalty, or refusal of duty, is sufficient to constitute an offense under Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c); so in a prosecution under such section, based on such utterances, an instruction that to constitute an attempt to commit a crime there must be specific intent to commit it, followed by an overt act, was confusing and properly refused.

6. CRIMINAL LAW ⟹829(3)—REQUEST COVERED BY INSTRUCTIONS GIVEN.

In a prosecution for violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), where the court instructed that it was necessary for

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the government to prove that, while the United States was engaged in war, defendant made false statements with intent to promote the success of the enemy, the refusal of a requested instruction that, unless the jury was satisfied the words spoken were of the character, and of adequate and sufficient magnitude and proximity to the thing intended, to bear out the intent charged, defendant should be acquitted, was properly refused, being covered.

7. CRIMINAL LAW ⟹262—ARRAIGNMENT—WAIVER.

In view of U. S. Comp. St. § 1698, defendant waived arraignment where, after the indictment was read to the jury, the clerk stated defendant had entered a plea of not guilty, and defendant proceeded to trial without objection, the date of which had been fixed by stipulation.

In Error to the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Al Shidler was convicted of violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), and brings error. Affirmed.

M. J. Scanlan and James Glynn, both of Reno, Nev., for plaintiff in error.

William Woodburn, U. S. Atty., of Reno, Nev., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Shidler was convicted under four counts of an indictment drawn under section 3 of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 218 (Comp. St. 1918, § 10212c). The first count alleged in substance that he willfully and unlawfully made certain false statements with intent to promote the success of the Imperial German government, the enemy of the United States, by stating in substance before certain named individuals "that the war between the United States and the Imperial German government was nothing but a capitalistic war, and if it was not for the graft and money to be made by the capitalists the United States would never have gone into war"; that the statements made were then and there false, as the defendant then and there well knew. The second count charged that defendant willfully and unlawfully made certain false statements with the intent to promote the success of Germany, and that in the presence of certain persons named he said, in substance, "that the war between Germany and the United States was started solely for the interest of the capitalists, who would reap a harvest and make immense profits from the sale of munitions and war material"; that these statements were false, and known by the defendant to be false. The third count alleged that, during the war between the United States and Germany, defendant willfully made certain false statements with the intent then and there to promote the success of Germany, in that, in the presence of an individual named, he said, in substance, as follows: "That the said war between the United States and the Imperial German government was started in the United States by the money power and grafters; that the government of the United States is controlled by Wall Street steel, iron, munitions factories, and shipbuilding interests; that the only reason that the war was being prolonged was for the

purpose of enriching the munition and supply corporations, Wall street, senators, congressmen, and other grafters, all of which were influencing the government to continue the war between the United States and the Imperial German government;" that the statements were false and defendant knew them to be false. In the fourth count it is alleged that defendant willfully, unlawfully, and feloniously did attempt to cause insubordination, disloyalty, and refusal of duty in the military forces of the United States, in that in the presence of certain persons, he said, in substance, as follows: "The draft law is the rottenest piece of injustice that was ever railroaded upon the American people; I will fight conscription as long as I have breath left in my body;" that said persons in whose presence these remarks were made were then and there male citizens of the United States between the ages of 21 and 30 years, and who had registered under the Draft Act of Congress approved May 18, 1917, entitled "An act to authorize the President to increase temporarily the military establishment of the United States." Act May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, §§ 2044a–2044k).

The plaintiff in error contends that: (1) It is not charged that the statements alleged were made to the injury of the United States, nor that any of the statements alleged resulted in the injury to the recruiting or enlistment service of the United States or to the United States; (2) that it does not appear from the alleged false statements of the defendant alleged in the first count of the indictment that any of such statements were or are calculated to, or were capable of being construed as in any way made to promote the success of the German government; (3) that it does not appear from the alleged false statements in the second and third counts that they were calculated or intended to promote in any manner the success of the German government; (4) that in the fourth count no fact or overt act constituting an attempt is set forth.

[1] It is accepted by counsel on both sides that three separate offenses are created by section 3 of the statute and plaintiff in error argues that the phrase "to the injury of the service of the United States" relates back to and is an essential element of all three, and must be alleged and proved. The section, as we understand it, defines these offenses: First, whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies; second, whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval service of the United States; third, whoever shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or the United States. The clause "to the injury of the service or of the United States" qualifies only its immediate antecedent; that is, the third subdivision of the section, which reads, "or shall willfully obstruct the recruiting or enlistment service of the United States." This would be the general rule of construction, which may be well invoked in this instance, when it is also

considered that the acts denounced and made criminal in the first two subdivisions, if consummated, obviously do injure the United States, while it would not necessarily follow that the acts done under the third subdivision would produce such results. The Hoquiam, 253 Fed. 627, 165 C. C. A. 253. As pointed out by Judge Ray in United States v. Pierce (D. C.) 245 Fed. 878, the earnest urgings by a mother to her son not to enlist could hardly be held to be a willful obstruction of the service of the United States. It is to be observed that section 3 was amended by Act May 16, 1918, c. 75, § 1, 40 Stat. 553 (Comp. St. 1918, § 10212c), by omitting the words "to the injury of the service or of the United States."

[2] With respect to the fourth count, it is argued that the statements alleged could be construed as the honest expression of an individual citizen, or a reckless statement of opinion. Assuming, for the purposes of argument, that a man might express such opinions and still be loyal to his country, still, if willfully and with evil mind he uttered the language with the intention of bringing about insubordination, disloyalty, and refusal of duty in the military forces of the land, he has violated the law and is subject to punishment and should be brought to trial. His acts, his speech, and the state of his mind become matters for the consideration by a jury under proper instructions upon the law of attempt to commit crime. 2 Bishop, New Criminal Law, § 741; People v. Grubb, 24 Cal. App. 604, 141 Pac. 1051.

[3] It is next said that the court erred in admitting in evidence a copy of the address of the President of the United States to Congress under date of April 2, 1917, wherein the President stated the causes which brought the United States into the war. Rules of evidence must be construed with due regard to practical convenience. How more directly could evidence be adduced that the statements charged to have been false were false than to introduce an official public statement made in the course of official duty by the head of the government to Congress, which body, within a few days after hearing the statement, formally declared the existence of the state of war? Certainly the recommendations of the President were in no wise binding upon the members of Congress, but nevertheless the message was relevant, as bearing upon the whole question of the truth or falsity of the statements alleged to have been made by the defendant.

[4] Certain statements made by the defendant prior to the declaration of war were admitted over the objection of defendant's counsel. The court, however, in admitting such statements, expressly ruled that they were before the jury solely to enable it to determine what the defendant's state of mind was at the time he uttered the statements charged in the indictment. We find no error in the ruling; United States v. Schulze (D. C.) 253 Fed. 377; article II, Stephen's Digest on the Law of Evidence.

[5] It is said that the court erred in refusing the following request for instruction:

"You are instructed that, to constitute an attempt to commit a crime, there must be a specific intent to commit it, followed by an overt act or acts tending to the commission of such crime. There must be something more than

mere preparation remote from the time and place of the intended crime, and if such overt act is not thus remote, and is done with the specific intent to commit the crime, and directly tends in some substantial degree to accomplish it, such specific intent and overt act, taken together, are sufficient to warrant a conviction."

The court held that the mere utterance of seditious words in the presence of a person liable to military duty under the Selective Service Law, if intended to induce insubordination, disloyalty, or refusal of duty in the military forces, was sufficient to constitute an offense under the statute. We believe the court was correct in its statement of the law, and in the charge given, and that the requested instruction was confusing.

[6] The court also refused to charge that, unless the jury was satisfied that the words spoken were of a character adequate and of sufficient magnitude and proximity to the thing intended to bear out the intent charged, the defendant should be acquitted. In view of the fact that the court instructed the jury that it was necessary for the government to prove that the United States was engaged in war, and that the defendant made a false report or a false statement, and that he made it with the intent to promote the success of the enemy, and that each of these elements must be proved beyond a reasonable doubt, we believe that the essentials of the offense were sufficiently and clearly stated.

[7] It is said that the court erred in denying motion in arrest of judgment. This assignment rests upon the contention that defendant never was arraigned and never was called upon to plead. The transcript shows that, when the bill of exceptions was presented to the District Court for allowance and settlement, the words "and no issue of not guilty has ever been joined in said cause" were stricken out, and the following inserted:

"The indictment was presented May 25, 1918. May 29th it was ordered that defendant appear for arraignment June 3d. A demurrer to the indictment was filed and argued June 8th, and on the 11th the demurrer was overruled. June 12th, both Mr. Woodburn, the District Attorney, and Mr. Scanlan, attorney for the defendant, were present in court. At that time this arrangement and colloquy occurred: Mr. Woodburn: 'Both counsel for the government and for Shidler have received notice that the demurrer was overruled, and I would like to fix a date for trial; and I am willing to stipulate with counsel that he may enter his plea on the day of the trial so as to save a trip here. That is the understanding?' Mr. Scanlan replied, 'Yes:' and at that time the trial was set for July 8th. Prior to the trial, and on June 24th, the defendant filed an affidavit to procure the attendance of witnesses in his behalf at the expense of the government. An order was made in accordance with the prayer of his petition, and the witnesses were subsequently produced on the day of the trial. At that time both parties appeared, and both announced they were ready for trial. After the jury was impaneled and sworn, the clerk of this court read the indictment to the jury, and in the presence of the defendant and his counsel stated that defendant had entered a plea thereto of not guilty. No objection was made to proceeding with the case because the arraignment had not been had, and no plea of not guilty was entered. The objection was not raised until the conclusion of the trial, and after verdict was rendered."

Under section 1698, United States Compiled Statutes 1916, it is provided in effect that when a person indicted for an offense, upon his arraignment, stands mute or refuses to plead, it shall be the duty of the

court to enter a plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto, and when a person pleads not guilty, and such plea is entered as aforesaid, the cause shall be deemed to be at issue, and shall proceed without further formal ceremony and be tried by a jury. In Garland v. State of Washington, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. Ed. 772, the court adopted the view which had been expressed by Justice Peckham in his dissenting opinion written in Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, wherein Justice Peckham said that a waiver should " 'be conclusively implied, where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until * * * the record was brought to the appellate court for review.' It would be inconsistent with the due administration of justice to permit a defendant, under such circumstances, to lie by, say nothing as to such an objection, and then for the first time urge it in this court." The court expressly overruled the Crain Case in so far as it was not in accord with the views expressed in the Garland Case. See, also, State v. Klasner, 19 N. M. 474, 145 Pac. 679, Ann. Cas. 1917D, 824, where it was held, upon the authority of the Garland Case, that appellant could not raise in the appellate court the question that she was not arraigned, where she had proceeded with the trial as if she had been duly arraigned, and failed to object or in any manner call to the attention of the trial court the fact she had not been arraigned.

We find no error in the record, and affirm the judgment.

(257 Fed. 625)

WALLACE v. WEINSTEIN.

In re WALLACE AUTOMOBILE CO.

(Circuit Court of Appeals, Third Circuit. April 30, 1919.)

No. 2410.

1. CORPORATIONS ⟹228—ASSESSMENT OF STOCKHOLDERS—UNPAID STOCK.
   Capital stock issued as full paid by a Delaware corporation on a contract for purchase of real estate, which was never carried out by full payment or conveyance of the property, was not issued on a conditional subscription, and was not only not full paid, but wholly without consideration, and assessable in the hands of the holder under the law of Delaware for the benefit of creditors.

2. CORPORATIONS ⟹232(3)—CAPITAL STOCK—PROSPECTIVE PROFITS.
   Under the law of Delaware, a corporation cannot lawfully capitalize prospective profits.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

In the matter of the Wallace Automobile Company, bankrupt. Jacob J. Weinstein, trustee in bankruptcy, petitioned for leave to assess

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its corporate stock in the amount same was not fully paid. From an order of the District Court, Robert Wallace appeals. Affirmed.

John Arthur Brown and Henry P. Brown, both of Philadelphia, Pa., for appellant.

Joseph Sternberger and Fox & Rothschild, all of Philadelphia, Pa., (George P. Rich, of Philadelphia, Pa., of counsel), for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and HAIGHT, District Judge.

WOOLLEY, Circuit Judge. The Trustee of the bankrupt corporation petitioned the Referee for leave to assess the stock of the corporation in the amount it had not been paid for, or in such lesser amount as would meet the obligations of the estate. Allowance of this petition turned primarily on the question whether the stock was full paid. It was ultimately decided by the Referee on a finding that the stock had been issued upon a conditional subscription, that the condition had not been performed by the corporation, and that, in consequence, the stock was not assessable. On review before McPherson, Circuit Judge, sitting in the District Court, the Referee's order was reversed and an assessment was directed to be made on certain shares held by Robert Wallace, the appellant, at a rate to be determined during the case. This appeal is from the order of the District Court.

The relevant facts are these: Wallace engaged in the automobile business through the medium of a Delaware corporation. He obtained a charter in July, 1912, and complied with the formalities of corporate organization by paying $1,000 in cash for the initial issue of 100 shares of stock. He named the directors and had himself elected treasurer and general manager.

Wallace owned two properties in Philadelphia in which he proposed the corporation should conduct its business. On August 8, 1912, he caused a contract to be made between himself and the corporation, in which he agreed to sell and the corporation agreed to purchase these properties for the consideration of $130,000—$30,000 in cash and $100,000 in the common stock of the corporation. No time was named for the issue and delivery of the stock; October 1, 1913, was the date set for the payment of the cash. It was agreed further, that the corporation should pay taxes, water rent, insurance, and interest on a mortgage, as rent until payment in full of the purchase price; repairs and improvements to be made and paid for by the corporation. Thereupon the corporation, in part performance of its undertaking of purchase, issued to Wallace 10,000 shares of its stock at the par value of $10 a share, as full paid stock. It then embarked in business, in the prosecution of which it obtained credits and incurred debts.

The contract of purchase and the stock issue were characterized by informalities not unusual in transactions of this kind. The minutes of the corporation record little of what was done or of what was intended to be done, and are silent with respect to any exercise of judgment by the directors as to the value of the property for which the corporation proposed to issue its stock and pay money. Both

Wallace and the corporation, however, regarded the properties so purchased as the consideration for the stock, and treated the stock as full paid when issued by the corporation and accepted by Wallace, though Wallace gave nothing for it and the corporation received nothing in return. On January 1, 1913, being a date many months after the corporation had issued its $100,000 of stock and had delivered it to Wallace in payment of the stock consideration for the properties, and being a date also many months prior to that named for the payment of the cash consideration of $30,000, Wallace and the corporation made another contract dealing with one of the two properties covered by the first contract. Whether it was intended that the second contract should abrogate the first, in whole or in part, does not appear, for it contained no reference to the first contract or to the previously proposed use of the same property as part consideration for the $100,000 stock issue.

By the second contract, Wallace leased one of his two properties to the corporation for a short term, in consideration of a nominal rent, and of the payment by the corporation of taxes, water rent and interest, and the making of improvements and repairs. Wallace then promised to sell to the corporation the one property named in the contract for $30,000 in cash, on a future date, notwithstanding he had already promised in the first contract to sell this and the other property for the same cash consideration, plus $100,000 of stock.

Just what Wallace intended by this transaction, we can not imagine. What is its legal effect, considered with reference to the proposed use of the same property as part consideration for the stock issue under the first contract, and its apparent withdrawal from that use under the second, we are not informed.

It appears that in his plan of corporate organization, Wallace intended to have 5,000 shares (or $50,000) of the stock issued directly to the corporation as full paid stock to be used as bonus to induce purchases of preferred stock, which was to be issued and sold later. This plan miscarried when the whole $100,000 of stock was issued to him. To carry out his original purpose, Wallace handed back to the corporation 5,000 shares and received in return a certificate for the same number of shares, made in his name as Trustee. His holding of treasury stock was thereafter reduced from time to time, as it was drawn on for use as bonus stock, until, at the last, he held but 3,925 shares.

On October 10, 1913, Wallace and the corporation entered into a third contract, whereby they expressly undertook to abrogate the first and second contracts for the sale of the properties, and to annul the transactions performed under them in so far as they related to the issue by the corporation and the acceptance by Wallace of the $100,000 of stock; being careful, however, to preserve to Wallace all benefits of taxes and interest paid and improvements made on the properties. The abrogation of the stock transactions was intended to be effected by Wallace surrendering to the corporation the 5,000 shares of stock retained by him personally, less the 100 shares paid for in cash, and so much of the treasury stock which then remained in his name as Trustee, amounting to 3,925 shares. The 5,000 shares

which Wallace thus surrenderd were cancelled, but the 3,925 shares, intended likewise to be surrendered, remained uncancelled and on the books.

At the time of this transaction, the corporation was insolvent, and a month later, that is, on November 6, 1913, it filed a voluntary petition in bankruptcy. The complete insolvency of the corporation at that time was shown later by the administration of the bankrupt estate, wherein the moneys realized from assets amounted to $2,900 and the scheduled debts and costs of administration exceeded $25,000.

Prior to bankruptcy, the corporation had paid $492.00 in taxes and water rents; $1,750.00 interest on the mortgage; and had expended upwards of $12,000 in improvements upon the property.

The two important facts occurring before bankruptcy are these: Wallace never conveyed the property to the corporation; the corporation made part payment on its contract of purchase by issuing and delivering to Wallace $100,000 of its stock as full paid. Wallace held both the property and the stock.

The two facts outstanding at the time of bankruptcy are these: The corporation had not paid Wallace the $30,000 cash part of the purchase price for the properties; Wallace still held his properties and so much of the stock as he had not succeeded in getting cancelled.

Wallace justifies holding the properties because the corporation did not make its cash payment of $30,000, and avoids liability for assessment on his stockholding upon the ground that the stock was issued to him under a conditional subscription and that the condition (the payment of the $30,000 cash consideration) had not been performed.

Preliminarily to deciding the question of assessment, we dispose of the contract of cancellation as void. In doing this, no comment is necessary, except to say, that the parties seem to regard the 5,000 shares which Wallace held as his own, and the 1,075 shares otherwise held and in part distributed as bonus, to be wholly out of the case, leaving in dispute only the 3,925 shares which stood in Wallace's name as Trustee at the time of bankruptcy. As all parties, both in the court below and in this court, restricted the controversy to this aspect of the case, as also did the trial court whose order is now under review, we are not disposed to go beyond it on this appeal. The question, therefore, is, whether the 3,925 shares of stock standing in the name of Wallace as Trustee at the time of bankruptcy are liable to assessment in his hands, as holder.

[1] We find this stock assessable under any aspect of the case.

We agree with the learned trial judge that "Wallace's subscription was not conditional." Wallace made a contract for the outright sale of his properties to the corporation, to be paid for by stock and money. Payment by the corporation of stock and money for the properties was not a "condition" of the subscription, as that term is used in the law of conditional subscriptions. Cook on Corporations, section 77–89. The corporation's promise to pay Wallace for his properties was the "consideration" for Wallace's promise to convey the properties to the corporation. Each promise was absolute; neither was affected by

conditions. Of course, as between the parties, neither promise was enforceable by one against the other without performance or a tender of performance by the moving party of his own undertaking. But we have here no contest between parties to enforce a contract; we have rather a situation where the corporation performed a part of its undertaking by issuing its stock and making part payment of the consideration, and where Wallace, by performing no part of his undertaking, made the issue of the stock as full paid impossible. While Wallace was not bound to convey the property to the corporation until the corporation had paid him the full consideration, and while the corporation was not required to make the stock payment to Wallace until it was ready to make the cash payment also, thereby making possible the issue of stock as full paid in return for property received, the facts are, the corporation made the stock payment and Wallace accepted it, and the transaction, instead of being a mistake or an inadvertence, was part of the plan for financing the corporation, which Wallace had carefully thought out. This is shown by Wallace's testimony, that, under the plan, $50,000 was intended to be issued as full paid stock—somehow or other—directly to the corporation to be used later as treasury stock in promoting the sale of preferred stock, and it is shown also by the fact, that, when Wallace discovered that a "mistake" in the plan had been made by delivering all of the stock to him, he split the stock, had one half put in his name as trustee and thereafter held and used it in promoting the sale of preferred stock, and retained the other half for himself. This was Wallace's way of rectifying the mistake. With the stock thus issued, held out and used, we are concerned not with the rights of Wallace and the corporation as parties to the stock transaction, but with the rights of creditors which have intervened. As Wallace retained both properties for which the stock was represented to be issued as full paid, and as the corporation on issuing the stock received nothing in return, it is very certain that the stock, though described as full paid, was not paid for at all. The effect of this transaction on the capital resources of the corporation is obvious. The effect upon the corporation's creditors is equally obvious.

All doubts as to the character and basis of liability to creditors of one who has thus acquired and thus holds stock of a corporation, are, under the law of Delaware, settled beyond dispute by the case of John W. Cooney Company v. Arlington Hotel Company (Del. Ch.) 101 Atl. 879, decided by the Chancellor and affirmed by the Supreme Court of that state, Du Pont v. Ball, 106 Atl. 39; following like decisions on a similar law by the courts of New Jersey in See v. Heppenheimer, Untermeyer et al., 69 N. J. Eq. 36, 61 Atl. 843; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618, affirmed by the Court of Errors and Appeals, 82 N. J. Eq. 364, 91 Atl. 1069. In these cases, corporate stock issued, outstanding and not paid for is regarded as a trust fund for the benefit of creditors. The courts of these jurisdictions treat this doctrine as a hard and fast rule imbedded in its law, never to be relaxed. But they go further and hold that stockholders' liability to creditors in such case no longer depends on the trust fund theory, but is a statutory liability.

In the case of John W. Cooney Company v. Arlington Hotel Company, supra, Chancellor Curtis, sitting in the trial court, and Chief Justice Pennewill, speaking for the Supreme Court on appeal, have so elaborately discussed the assessment of corporate stock and the liability of stockholders for assessment under the constitution and statute of the State of Delaware, that repetition of that discussion would add nothing to the decision there made. There is, however, one statement of the Chief Justice, which is peculiarly applicable to the question in this case. It is as follows:

"And even though stock issued without consideration could be held to be void under our constitutional provision, and could be cancelled by the corporation or upon the application of bona fide stockholders, it does not follow that the acceptor of such stock could claim immunity from assessment. Certainly a stockholder carnot escape such assessment if he has held himself out, or permitted himself tc be held out, as the owner of the stock; and much less could he escape if he participated in the unlawful issue or acquiesced therein."

We see nothing in the case that avoids assessment of the stock of the bankrupt corporation or that absolves Wallace from his liability to meet an assessment on stock standing in his name at the time of bankruptcy to an amount equal to its face or such lesser amount as will discharge the obligations of the bankrupt estate.

Having reached this decision, we would not discuss the other aspects of the case except for the attention given them in the testimony and at the arguments, and for the insistence with which they were urged. The first had to do with the value of the properties intended for use as the basis of the stock issue. Wallace contends that the properties were in truth equal in value to the face of the stock, and that, in consequence, the stock when issued for the properties was in fact full paid. As the properties were never conveyed to the corporation and as stock could not be issued against property which the corporation had not acquired, we are at a loss to know the pertinency of this contention. But, assuming there is in the case a basis for this contention, Wallace proved by his own testimony that the stock is not full paid. While he proposed by his first contract to sell the properties to the corporation for the total consideration of $130,000, the highest value he put upon them was $75,000, which, after deducting encumbrances, left an equity of but $12,000. As to the real value of the property and its value for the purpose of capitalization, Wallace made this naive admission:

"*There was a certain amount of stock given to you that you don't always pay for.* Take $30,000 from $75,000 and it leaves $45,000, and deducting your mortgages of $33,000 leaves $12,000 *for which the stock was given.*"

On this testimony, it is quite impossible to hold that the $100,000 of stock was full paid.

[2] The next contention is, that the $100,000 of stock was paid for—in part, at least—by Wallace's transfer to the corporation of certain contracts of agency with automobile manufacturers, alleged to be worth $50,000. If such contracts were transferred to the corporation for its stock—even at the value subsequently placed upon them—then the stock at the best was only half paid for. But there

is nothing contemporaneous with the stock transaction which indicates, that the agency contracts were assigned to the corporation in part consideration for the stock. But if they were so assigned, the contracts—which later proved valueless—if property in any sense—were not property of a kind for which stock can be issued. They contained nothing more substantial than a promise of profits. Contemplated profits cannot be a basis of capitalization of a corporation under the Delaware law, for neither stockholders nor directors have any right to make a present capitalization of prospective profits. See v. Heppenheimer, Untermeyer et al., supra; Holcombe v. Trenton White City Co., supra; John W. Cooney Company v. Arlington Hotel Company, supra. The agency contracts cannot be regarded as consideration for the stock in any amount.

Any question of Wallace's liability as a stockholder for assessment on unpaid stock, though standing in his name as Trustee, and any question of the right of the Trustee in bankruptcy to enforce his liability for the benefit of creditors, by analogy to a like right of a receiver of an insolvent corporation, are set at rest under the laws of Delaware by the decisions in John W. Cooney Company v. Arlington Hotel Company, supra. The case cited is distinguished from Courtney v. Georger, 228 Fed. 859, 143 C. C. A. 257, by the interpretation which the courts of Delaware have given the Delaware statute. See also Alling v. Wenzel, 133 Ill. 264, 24 N. E. 551; Allibone v. Hager, 46 Pa. 48; 1 Cyc. 714.

The order of the District Court is affirmed.

(257 Fed. 631)

GOOCH v. STONE.

In re SMITH et al.

(Circuit Court of Appeals, Sixth Circuit. March 12, 1919.)

No. 3194.

1. BANKRUPTCY ⟹166(3)—PREFERENCE—KNOWLEDGE OF INSOLVENCY.
   A creditor of one member of bankrupt partnership, which was hopelessly insolvent, who received from his debtor in partial payment of notes not due merchandise bought to his knowledge entirely on credit of the firm, and who also had intimate knowledge of its affairs, *held* to have such knowledge of its insolvency as rendered the payment a voidable preference.
2. BANKRUPTCY ⟹293(2)—SUIT BY TRUSTEE—EQUITY JURISDICTION.
   With defendant's consent a bill in equity by a trustee to recover a preference may be entertained by a District Court.

Appeal from the District Court of the United States for the Western District of Tennessee.

Suit in equity by W. H. Stone, trustee in bankruptcy of I. C. Crow and O. W. Smith or Crow & Smith, against J. R. Gooch. Decree for complainant, and defendant appeals. Affirmed.

Frank S. Elgin, of Memphis, Tenn., for appellant.

T. B. Whitehurst, of Selmer, Tenn., for appellee.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before WARRINGTON and DENISON, Circuit Judges, and KILLITS, District Judge.

KILLITS, District Judge. In October, 1912, the appellant, J. R. Gooch, sold to parties in Birmingham, Ala., a general store owned by him for some time at Gravel Hill, Tenn. At that time, and for nearly two years theretofore, one of the bankrupts (Smith) had clerked for Gooch in this store at a salary from $25 to $35 per month. Smith continued in the employ of the purchaser of Gooch's store until the merchandise was moved to Birmingham in the early summer of 1913. Soon thereafter Smith began business for himself at Gravel Hill, at the same time buying from Gooch 38 acres of land with a frame store building thereon and other improvements. He bought this land altogether on credit, executing long-time notes for the payment, involving him in an indebtedness of over $3,000 for the purchase; Gooch retaining title to the property until the consideration was paid. Shortly after the Gooch stock had been removed to Birmingham, a portion of it was returned to Gravel Hill by one Dunker, who bought the old Gooch brick store building from Gooch's vendee. This real estate was bought by Dunker entirely on credit, a trust deed upon the goods and store real estate being given as security. The trust was foreclosed in the summer of 1914 and bought at public sale by Gooch. At this time, Smith, in addition to his debts to many other parties, owed Gooch about $600, unsecured, besides the debt on the land, and $800 to a bank on which Gooch was security.

In July, 1914, Crow, the other bankrupt, went into partnership with Smith at the suggestion of Gooch. Crow seems to have contributed no money, but expected to put in $1,000 in the fall. His connection with Smith lasted but a month, during which time the firm of Crow & Smith bought of Gooch the Dunker store and brick building on credit for $6,746.47. The Dunker stock of goods, which had been bought by Gooch at the sum of $250, to which had been added about $200 of new goods, was figured into this trade for more than $1,600. The circumstances show that the valuation of $6,715.41 for the Dunker assets, real and personal, even figured on what the parties called a credit basis (that is, adding to the assumed present value the interest on the deferred payments), was very much exaggerated. Gooch retained title to the property sold by him to Crow & Smith, pending the payment of the consideration notes, and, in addition, required and received personal security on the note first due which was in the sum of $1,646. This note he sold before maturity to a relative. Crow retiring in August, 1914, Smith struggled along with the business until September, when he made an assignment which was followed by involuntary bankruptcy, the adjudication occurring October 24, 1914. His liabilities were about $18,000; the unsecured claims amounting to $8,711. His assets consisted of the two parcels of real estate, bought from Gooch, the title to each of which still remained in Gooch to secure the purchase money, and upon which Gooch's claims were for a greater amount than their real values, and personal property scheduled at $6,509.33, which includes the matter involved in this con-

troversy as having been received by Gooch as a preference. Gooch proved an unsecured claim of $2,250, in which was included the item of $1,650 for the Dunker stock of goods, and two secured claims of $5,068.74 and $2,500.88, being the aggregate amounts of the several sale notes held by Gooch for the purchase by contract of the two parcels of real estate, respectively. The second secured claim was reached in its amount ($2,500.88) by crediting the alleged preference which is the subject of this action. Gooch's claim for $5,068.74 was made up from the notes of the Dunker purchase left in his hands after the sale of that first due. The personal property scheduled consisted of the merchandise at a great overvaluation.

Two or three days after the partnership was formed, Smith met Gooch in Memphis. Together they went to the Memphis Furniture Manufacturing Company's place of business, where, upon a property statement, Smith bought a bill of furniture aggregating $964 on the credit of the partnership, all without the knowledge or authority of Crow. Of this bill of furniture, Smith permitted Gooch to take items amounting to $623.32, shipping these goods to Birmingham, to which place Gooch had removed. The consideration for this transaction was the liquidation of the first note due from Smith to Gooch, given for the purchase of the 38 acres of land and a credit of $127 on the second note of that series; neither of said notes having matured. Later in 1914 proceedings in bankruptcy were begun against the partnership.

The trustee in bankruptcy began an action in the District Court to recover $623.32 from Gooch, being the value of the furniture so purchased, on the ground of preference, and from the decree of that court against Gooch, the latter appeals.

[1] Appellant first contends that the record does not disclose his knowledge, or reasonable notice to him, of the insolvency either of Smith or of Crow & Smith at the time he received the furniture. There is no possible question but that the transaction resulting in the acquisition of the furniture by Gooch was a preference to him to the amount of $623. It is equally clear—there is no room for dispute—that Smith and the partnership were each hopelessly insolvent at the time of this transaction. What is there to show notice to Gooch of the fact of insolvency? In the first place, the largest elements contributing to either insolvency—and these alone were enough to compel such a result—were the transactions whereby Gooch became creditor to Smith and to the firm in amounts greatly in excess of the values of the assets acquired by the bankrupts in consideration for the respective items of indebtedness. Secondly, Gooch is shown to have been not only the intimate of Smith, but his close adviser in business matters. In this capacity, and in the relationship which they had theretofore sustained to each other as employer and employé, and then as surety and principal on the bank note, and as creditor and debtor for money loaned without security and on open account, to assume that Gooch did not have somewhat intimate acquaintance with Smith's affairs is to classify the appellant as an abnormally trusting, credulous, and disinquisitive individual. Again, the proof shows that it was a

matter of notoriety in the little community that Smith and the firm each were beyond their depth financially. In addition, testimony exists in the record, in some particulars sought to be impeached, of statements by Gooch to the effect that he knew that Smith was insolvent, that Crow contributed nothing which assisted the partnership to solvency, and that Smith was a careless and impossible business man.

The court below heard and apparently credited this direct testimony. These matters alone seem to compel the conclusion that Gooch knew or had reason to know at the time of the furniture deal that he was receiving a preference from an insolvent. If anything else were necessary to make the decision of the fact certain against appellant, it would be the nature of the transaction itself. It taxes credulity to be asked to believe that Gooch took two-thirds of the bill of furniture, purchased entirely on credit and charged to the partnership, and applied it to the liquidation, pro tanto, of a debt owing him by a partner before the debt matured, all in good faith with the creditors either of Smith or of the firm of Crow & Smith. Having done this while in possession of all the facts concerning the business of either of the bankrupts, which Gooch in his testimony is willing to admit he possesses, and as we are advised by the whole record, we find no difficulty in resolving the question of the fact of notice against appellant. We may do this without reference, even, to the general rule that when, as here, findings of a master, concurred in by the court below, are in review, they are presumed to have been correct in the absence of error or mistake appearing on the record. Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764.

[2] At the time of the beginning of the suit the defendant appellant lived beyond the jurisdiction of the court. The petition was filed May 25, 1915. June 15 the defendant answered, "waiving all right to object to the petition or declaration or bill or whatever the pleading may be termed by which he is called upon to defend and going to the merits at once." The issues being made up, the court referred the matter to a master to take proof and report findings. To reference there was no objection. Upon the coming in of the master's report adverse to appellant, counsel for the parties joined in a stipulation for the hearing of exceptions at Memphis. The exceptions raised no issue of jurisdiction whatever. Hearing them, the court sua sponte dismissed the case on the theory, among others, that this was an action at law, not cognizable in equity, upon the authority of Warmath v. O'Daniel (C. C. A. 6th Cir.) 159 Fed. 87, 86 C. C. A. 277, 16 L. R. A. (N. S.) 414. On rehearing, it was suggested to the court that the objection to the jurisdiction, on the ground that the action lay on the law side of the court, came too late after submission, whereupon the court reheard the matter upon the merits. In this there was no error. The exact question was raised by this court on certificate to the Supreme Court where it was held that, by defendant's consent, a bill in equity by trustee in bankruptcy to recover property conveyed in fraud

of the bankruptcy act might be entertained by the District Court. Hicks v. Knost, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183. Recently we held in Golden Hill Distilling Co. v. Logue, 243 Fed. 342, 156 C. C. A. 122, that, since the amendment of 1910 (Act June 25, 1910, c. 412, 36 Stat. 838) the bankruptcy court has jurisdiction of a suit to recover a preference, regardless of the amount involved or the citizenship of the parties. These authorities dispose of all the appellant's objections respecting the jurisdiction of the court below.

There remains but one other question: On the motion of the trustee there were brought into the record, on the hearing of the exceptions, the two bankruptcy records. There was proof satisfactory to the court below that the parties used these records before the master and that it was orally stipulated that the same might be used for all pertinent purposes in the hearing upon the exceptions. We find no prejudicial error in the disposition of this matter below. These considerations dispose of this case.

The decree and order of the court below, that the trustee have and recover of the defendant, J. R. Gooch, the sum of $735.14, with all costs of the case, with execution, were proper, and are affirmed.

(257 Fed. 635)

UNION LAND & STOCK CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3154.

1. WATERS AND WATER COURSES ⟹33—SUIT TO DECLARE FORFEITURE—PUBLIC INTEREST.

The District Court of the United States will entertain a suit by the United States to declare a right of way and easement for the storage of water, applied for under Act March 3, 1891, forfeited for failure to construct or complete the reservoir described in the application.

2. WATERS AND WATER COURSES ⟹33—LAND GRANT FOR RESERVOIR—AUTHORITY OF ATTORNEY GENERAL.

The Attorney General had authority to bring suit in the name of the United States to declare forfeiture of a right of way and easement for the storage of water, applied for pursuant to Act March 3, 1891; the applicant having failed to construct the reservoir, as shown by his application as approved by the Secretary of the Interior.

3. WATERS AND WATER COURSES ⟹27—GRANT FOR WATER STORAGE—STATUTES.

Act March 3, 1891, § 18 (Comp. St. § 4934), as to rights of way granted to ditch companies for the storage of water, does not confer a right independently of section 19 (section 4935), providing how any canal or ditch company may secure the benefits of the act, as the two sections are to be construed together.

4. WATERS AND WATER COURSES ⟹33—FORFEITURE OF RIGHT OF WAY AND EASEMENT FOR WATER STORAGE—BURDEN OF PROOF.

In suit by the United States to declare forfeited a right of way and easement for the storage of water, applied for pursuant to Act March 3, 1891, for failure to construct the reservoir as shown by the application as approved by the Secretary of the Interior, to declare the forfeiture, it was not necessary to prove that a dam higher than the one constructed

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

by defendant applicant could have been practically used, or that there was sufficient water to have filled a larger reservoir; the contrary being for applicant to show, if true.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suit by the United States against the Union Land & Stock Company, a corporation. From a decree for the United States, defendant appeals. Affirmed.

The appellee brought a suit in equity to declare forfeited a right of way and easement for the storage of water. It was alleged in the bill that on February 23, 1895, the appellant, under the provisions of an act of Congress of March 3, 1891 (26 Stat. 1101, c. 561), filed in the Land Office at Susanville, Cal., its application for an easement for a reservoir for irrigation purposes, describing the same, in the map which was attached to the application, as reservoir No. 1, or Lake Luckett, and which covered and affected certain described portions of the public lands of the United States, of which the appellee then and for a long time prior thereto had been the owner in fee simple. The bill alleged that on November 18, 1895, the application was duly approved by the Secretary of the Interior; that no part of said reservoir or section thereof has been constructed or completed by the appellant since the approval of said right of way by the Secretary of the Interior. The prayer of the bill was that the easement be declared forfeited and canceled, and that the appellant and all claiming under it be forever estopped from asserting any right, title, or interest in or to said lands, and that all title, rights, etc., to the property described in the application be reinvested in the appellee, and that the grant be declared null and void.

The appellant moved to dismiss the bill for want of equity. The motion was overruled, and the appellant answered, denying that the appellee was the owner of the lands covered by the easement, and alleging that the appellant was the owner thereof, and denying that the reservoir had not been constructed or completed, and alleging the construction and use of the reservoir for the storage of water and irrigation. It was stipulated in open court that in the years 1894 and 1895 the appellant went on the ground at the point A, indicated on the map attached to the bill of complaint, and after November, 1895, constructed a dam which at that time was 35 feet high; that said dam remained at that height until the winter of 1897–98, when a portion of it was washed away; that in the fall of 1898 the dam was reconstructed to a height of 26 feet, but settled down to a height, at its lowest, of 23 feet, at which point it now remains; that said dam has 300 feet of 30-inch steel pipe through the bottom, with a patent gate in shape to store and withdraw water. The stipulation further recites:

"It was also shown by competent evidence that the dam as constructed would not store water over more than 100 acres of the land in said reservoir, and that it did not have a capacity of more than 600 acre feet of water; that the dam was in a bad state of repair, but that it was strong enough to store water in the reservoir to a depth of 20 feet; that the base was not of sufficient width to build the dam to a height of 50 feet; that the said reservoir is one of a series of reservoirs, the others being known as dams Nos. 2 and 3, and that they are all used in connection with each other; that reservoir No. 1, being the one in suit, has been mainly used for the irrigation of what is known as the 'Moulton Ranch,' under a verbal agreement with the owners of said ranch; that the defendant company had been properly notified, and cited to relinquish said reservoir site or show cause why judicial proceedings should not be instituted to cancel the grant, for the reason that the dam had not been built in accordance with the application, as shown on Exhibit A, attached to the complaint; that the defendant had had 20 years in which to complete said dam in accordance with said plans; that said reservoir has been used to store water each year since its construction, with the exception of dry years, when there was no water to store."

R. L. Shinn and A. L. Hart, both of Sacramento, Cal., for appellant.

Annette Abbott Adams, U. S. Atty., and Frank M. Silva, Asst. U. S. Atty., both of San Francisco, Cal. (H. P. Dechant, of San Francisco, Cal., of counsel), for the United States.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant contends that the bill should have been dismissed for want of equity, for the reason that it is brought to declare a forfeiture, and cites Horsburg v. Baker, 1 Pet. 232, 236, 7 L. Ed. 125, and Marshall v. Vicksburg, 15 Wall. 146, 149, 21 L. Ed. 121. In the latter case it was said:

"Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either."

But the rule thus stated has not always been adhered to in the absolute form in which it is expressed. Thus in Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332, Mr. Justice Brewer said:

"Forfeitures are never favored. Equity always leans against them, and only decrees in their favor when there is full, clear, and strict proof of a legal right thereto."

The reason for the rule is that forfeitures are regarded as harsh and oppressive, and the rule has been held not to apply to cases in which forfeiture is imposed by statute and where public interests are to be subserved thereby. In Farnsworth v. Minn. & Pac. R. R. Co., 92 U. S. 49, 68 (23 L. Ed. 530), it was said:

"But there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law."

It is to be added that the Supreme Court has entertained jurisdiction of suits in equity to forfeit land grants in numerous cases, among which may be mentioned United States v. California, etc., Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354; United States v. Oregon, etc., Railroad, 164 U. S. 526, 17 Sup. Ct. 165, 41 L. Ed. 541; United States v. Tennessee & Coosa Railroad, 176 U. S. 242, 20 Sup. Ct. 370, 44 L. Ed. 452; Oregon & Cal. R. R. v. United States, 238 U. S. 393, 35 Sup. Ct. 908, 59 L. Ed. 1360. It is true that in those cases forfeiture was not the only relief sought. One of them was a suit to quiet title. In others, the aid of equity was sought to declare forfeiture, and to cancel patents or certificates or to obtain injunctive relief. The present case is in its essential features a suit to quiet title. The relief sought, in addition to forfeiture, is that the appellant be estopped from asserting any right, title, or interest in the lands, and that all title rights therein be reinvested in the appellee. We think the motion to dismiss was properly denied.

[2] It is contended that there is no authority for the prosecution of the suit, and United States v. Washington Improvement & D. Co. (C.

C.) 189 Fed. 674, is cited. In that case, in construing a congressional grant for a railway, telegraph, and telephone line through the Colville Indian reservation, with a proviso that the rights therein granted should be forfeited by the grantee unless 25 miles of the railroad should be constructed within two years after the passage of the act, and a further reservation to Congress of power to alter, amend, or repeal the act in whole or in part, Judge Rudkin held that a court of equity had no inherent power to decree a forfeiture of the land grant and that the United States could not maintain a suit to recover the land for breach of a condition subsequent, unless Congress had declared a forfeiture or had given express authority for the institution of the suit.

There are some grounds of distinction between that case and this. That was a case of a special grant to a specific grantee, with a reservation of power in Congress to alter, amend, or repeal the same. Here the grant of rights is a general one. It opens the lands of the United States to the occupation of various and numerous applicants. By a general and permanent statute it provides the steps which they must take to acquire the rights contemplated by the grant. The forfeiture clause is as follows:

> "Provided that if any section of said canal or ditch shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture."

It is not to be supposed, we think, that Congress intended that the United States should have no remedy for the failure of an applicant to complete his canal, ditch, or reservoir within the time limited, unless Congress intervened and by a special act either declared the right forfeited or gave express authority to institute a suit to recover the land.

In United States v. Whitney (C. C.) 176 Fed. 593, Judge Dietrich, in construing the law which is involved here, held that a failure to comply with the requirements of the statute of itself operated to divest the grantee of title and revest it in the government, and that a declaration of forfeiture might be either by act of Congress or by an appropriate judicial proceeding. With that view we agree, and although, aside from the two cases cited, we find no decision directly involving the question here presented, we think the decisions of the Supreme Court, as reviewed in Spokane, etc., Ry. v. Wash. & Gt. Nor. Ry., 219 U. S. 166, 174, 31 Sup. Ct. 182, 184 (55 L. Ed. 159), which establish the doctrine that, where the conditions of the grant are subsequent, "the title cannot be forfeited, except upon proper proceedings by the government, judicial in their character, or an act of Congress competent for that purpose," are sufficient in their scope to justify the suit here brought at the instance of the Attorney General, which is a proper proceeding by the government, judicial in its character, and appropriate for the purpose of declaring a forfeiture.

[3, 4] The appellant contends that there was no authority in law or equity to hold its rights for cancellation, and in view of the language of section 20 of the act contends that the court was limited in its

judgment to declaring a forfeiture of that portion of the reservoir which had not been utilized, and refers to the fact, recited in the stipulation, that the reservoir mentioned in the bill is one of a series of three, which are all used in connection with each other. It would seem that the appellant's position is that the decree forfeits the ground occupied by all three reservoirs. There is nothing in the record to show this. The bill alleged that the appellant's application called for a reservoir site covering approximately 469 acres, with a dam at the outlet 50 feet in height, with a base width of 270 feet, a length on top of 230 feet, and a length at the bottom of 80 feet, calculated to store, when completed, water over the entire acreage of the reservoir. The record does not indicate upon what land the other two reservoirs are located. The decree makes no reference to them. If they are located upon the 469-acre tract, they have been constructed and maintained without authority of law, so far as the record advises us.

We do not agree with counsel for the appellant that section 18 of the Act (Comp. St. § 4934) confers a right independently of the provisions of section 19 (section 4935). Those two sections are obviously to be construed together. Nor do we find merit in the contention that to declare forfeiture it was necessary for the appellee to prove that a dam higher than 23 feet could have been practically used, or that there was sufficient water to have filled a larger reservoir. If the contrary were true, it was for the appellant to show it. It made no effort to amend its application, so as to justify the construction and maintenance of a dam of 23 feet, and when it was notified and cited to relinquish the reservoir site, or to show cause why judicial proceedings should not be instituted to cancel the grant for the failure to build the same in accordance with the application, it made no showing of cause, and no effort to amend its application.

The decree is affirmed.

(257 Fed. 639)

MEAD v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919. Rehearing Denied June 2, 1919.)

No. 3238.

1. WAR ⟹4—ESPIONAGE ACT—HINDERING MILITARY FORCES OR PROMOTING SUCCESS OF ENEMY—FALSE STATEMENTS—PERSONS TO WHOM MADE.

   In view of the terms of the Espionage Act and the obvious purposes of its enactment, to constitute a violation of its provisions it is not essential that the false reports or statements intended to hinder the operation of the military forces of the United States, or to promote the success of its enemies, must have been made to persons in the military or naval service of the United States; it being sufficient that they were made to recruits for the Canadian forces.

2. CRIMINAL LAW ⟹304(2)—JUDICIAL KNOWLEDGE—MATTER OF COMMON KNOWLEDGE—WAR.

   Courts take judicial notice of the commencement and existence of the war between the United States and Germany, and of the further fact that it has been conducted in conjunction with the United Kingdoms of Great

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Britain and Ireland and the Dominion of Canada, among other nations, and that to promote the success of Germany is to promote the success of an enemy of the United States.

3. WAR ⟹4—ESPIONAGE ACT—FALSE STATEMENTS HINDERING CANADIAN RECRUITING.

Defendant, who made false statements tending to interfere with the successful operation of the Canadian recruiting offices authorized in the United States by Act Cong. May 7, 1917 (Comp. St. 1918, § 10174), violated the Espionage Act by making false statements interfering with the success of the military and naval forces of the United States, and tending to promote the success of its enemies.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

W. E. Mead was convicted of violating the Espionage Act, and brings error. Affirmed.

H. E. Foster, of Seattle, Wash., for plaintiff in error.

Robert C. Saunders, U. S. Atty., Clarence L. Reames, Sp. Asst. Atty. Gen., and Hinman D. Folsom, Jr., all of Seattle, Wash., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was charged by indictment with a violation of the Act of Congress of June 15, 1917, c. 30, 40 Stat. 217, known as the Espionage Act, and convicted and sentenced to imprisonment in the penitentiary.

The act provided, among other things, as follows:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, * * *" shall be punished, etc. Comp. St. 1918, § 10212c.

It is asserted with much apparent confidence on the part of the plaintiff in error that the indictment is insufficient to state any offense under that statute. It contains two counts, the first of which charges in effect:

That during the times therein stated the United States, as well as the United Kingdom of Great Britain and Ireland and the Dominion of Canada, were and still are at war with the Imperial German government, as the defendant well knew, and that the military and naval forces of the countries mentioned were and still are co-operating and fighting together against the said Imperial German government for the purpose of promoting the success of their armed military and naval forces, of all of which facts the defendant was well aware; that as the defendant well knew, at and during all the times mentioned, any injury done to or inflicted upon the military or naval forces of the Dominion of Canada, or of the United Kingdom of Great Britain and Ireland, and any disloyalty, mutiny, or refusal of duty by any soldier or recruit so engaged, would constitute and be an injury to and would interfere with the operation and success of the military and naval

forces of the United States; that at a certain designated time during the existence and progress of such war the steamship Queen was a vessel belonging to the Pacific Coast Company, a corporation of the state of New Jersey, licensed to do business in the state of Washington, under charter to the Pacific Steamship Company, a corporation of the state of Maine, which charterer was also licensed to do business in the state of Washington, both of which corporations were actually transacting business in that state; that the said steamship was during all of the times mentioned in the indictment duly registered under the laws of the United States, the flag of which country it flew while on the high seas; that on a certain named day during the existence and progress of the said war, and while the said steamship was on the high seas and out of the jurisdiction of any particular state, en route from San Francisco, Cal., to Seattle, in the state of Washington, the said defendant, being a passenger thereon, and within the jurisdiction of the court below, did then and there willfully and feloniously orally make and convey certain false reports and false statements, with the intent to then and there and thereby interfere with the operation and the success of the military and naval forces of the United States, such false statements and reports consisting of the following words, phrases, and sentences:

"I understand that you have given up a job at $150 per month and sold your auto to join the forces. I can give you a thousand reasons why you shouldn't fight. This is a capitalistic war, started by England because she is afraid of Germany corraling commerce. President Wilson is in the same swim with the British in backing up the capitalist. You are a damned fool to take any interest in it whatever."

That said statements were willfully and feloniously made by the defendant to Herbert Kortlang and J. F. Storry, they then and there being, as the defendant well knew, recruits in the Canadian Expeditionary Forces theretofore recruited for the Sixth Field Company of Canadian Engineers, and each of them, as the defendant well knew, being about to proceed to take an active part in the said war on the side and in behalf of the Dominion of Canada and against the armed military and naval forces of the Imperial German government, there being then and there also present, as the defendant well knew, and to whom he then and there made the said false reports and statements, a large number of other recruits of the said Canadian Expeditionary Forces, among whom were M. Long, John Doe McKenzie, John Doe O'Toole, John Doe Ryan, and other recruits whose names are to the grand jurors unknown; that in making and conveying the said false reports and statements the defendant then and there did so willfully and feloniously and with the intent to thereby interfere with the operation and success of the military and naval forces of the United States whereas, in truth and in fact he then and there well knew that the said report and statement:

"I can give you a thousand reasons why you shouldn't fight. This is a capitalistic war, started by England because she is afraid of Germany corraling commerce. President Wilson is in the same swim with the British in backing up the capitalist. You are a damned fool to take any interest in it whatever"

—and each and every sentence and phrase thereof and each and every of said statements and charges were then and there false and untrue, and were by the said W. E. Mead then and there as aforesaid spoken and uttered to the said Canadian recruits with the intent then and there in the said W. E. Mead to interfere with the operation and success of the military and naval forces of the United States, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America.

The second count of the indictment is precisely similar to the first, except that it charges the defendant with having willfully made the said reports and statements with the intent to promote the success of the enemies of the United States.

The failure of the indictment to set forth the false reports and statements, in order to give the defendant the necessary information to enable him to prepare for his defense, which was the basis of the judgment of this court in the case of Foster et al. v. United States, 253 Fed. 481, 165 C. C. A. 193, sustaining the demurrer to the indictment in that case, was obviated by the pleader in the case at bar; for here the alleged false reports and statements are specifically set forth.

[1] In view of the terms of the act of Congress and the obvious purposes of the enactment, we are unable to hold that in order to constitute a violation of its provisions it is essential that the false reports or statements must have been made to persons in the military or naval service of the United States. In the consideration of such cases it should never be forgotten that war is a matter of life or death, and that a nation in such circumstances is no more powerless to protect its life than is an individual to save his, when attacked, by the use of such force as is necessary. It was in the exercise of that power that Congress passed the act which is the basis of the present indictment. Free speech in times of war is by no means the same thing as free speech in times of peace. The false reports and statements inhibited by the statute under consideration are such as are willfully made or conveyed "with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies."

[2] Apart from the circumstance that the fact was proved by witnesses in the present case, it does not admit of doubt that the courts take judicial knowledge of the commencement and existence of the present war between the United States and Germany, and of the further fact that it has been conducted in conjunction with the United Kingdom of Great Britain and Ireland and the Dominion of Canada, among other nations, nor does it admit of question that to promote the success of Germany is to promote the success of an enemy of the United States.

The assignments of error respecting the evidence introduced amount to nothing, for the obvious reason that not one of them specifies any evidence of which complaint is made. The charge of the court, we think, fairly presented the case to the jury, whose exclusive province it was to determine the facts.

[3] Congress by its act made it criminal for any one, while this country is at war, to willfully make false statements or convey false re-

ports, "with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies." And by act approved May 7, 1917 (40 Stat. 39, c. 11 [Comp. St. 1918, § 10175]), expressly authorized its allies, England and Canada, to open recruiting offices in the various cities of the United States. That any interference with such recruiting service necessarily interfered with the success of the military and naval forces of the United States and tended to promote the success of its enemies we consider too plain for argument.

The judgment is affirmed.

(257 Fed. 643)

SANDBERG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 3187.

WAR ⟹4—ESPIONAGE ACT—SEDITIOUS STATEMENTS.

Statements made by defendant, in each case to a single person in the course of a private conversation relating to the war, *held* mere expressions of opinion, not made in violation of section 3 of the Espionage Act.

In Error to the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Criminal prosecution by the United States against August Sandberg. Judgment of conviction, and defendant brings error. Reversed.

C. N. Gary, of Oakland, Cal., and A. A. Worsley, of Tucson, Ariz., for plaintiff in error.

Crittenden Thornton, of San Francisco, Cal., amicus curiæ.

Thomas A. Flynn, U. S. Atty., of Phœnix, Ariz., C. R. McFall, Asst. U. S. Atty., of Tucson, Ariz., John W. Preston, Sp. Asst. Atty. Gen., and Caspar A. Ornbaun, of San Francisco, Cal., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. Section 3 of the act of Congress known as the Espionage Act, approved June 15, 1917, is as follows:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished" in a prescribed way. 40 Stat. 219, c. 30, tit. 1 (Comp. St. 1918, § 10212c).

The plaintiff in error was charged by indictment containing six counts with certain violations of that law. A demurrer to the fourth count was sustained, and demurrers to each of the other counts were overruled, followed by his trial, conviction, and sentence. The first count charged that the defendant on a certain named day in Decem-

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ber, 1917, within the district of Arizona, with intent to interfere with the operation and success of the military and naval forces of the United States, did willfully make this false statement in the presence of one Robert E. Cameron and other persons to the grand jurors unknown:

"That our entry into the war was brought about by the Wall Street interests, in order to protect our foreign loans to the Allies."

By the second count it was alleged that the defendant willfully attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, in that he did on the 22d of July, 1917, within the district of Arizona, in the presence of one E. M. Graham and other persons to the grand jurors unknown, make this statement:

"That the German government was much more democratic than ours; that the German people enjoyed greater liberties than the Americans; that it will be a great blow to civilization if Germany should lose."

By the third count it was charged that the defendant willfully attempted to cause similar insubordination, disloyalty, mutiny, and refusal of duty by making, in the presence of Eugene H. Broughton and other persons to the grand jurors unknown, this statement:

"That the Germans had a better form of government than the people of America, that President Wilson was a weak character to allow England to dictate its policy, and then the President coming out and making speeches to back up the British policies."

By the fifth count the defendant was charged with having on the 15th of December, 1917, within the district of Arizona, willfully attempted to cause similar insubordination, disloyalty, mutiny, and refusal of duty, in that he did make, to Robert E. Cameron and other persons to the grand jurors unknown, this statement:

"That the invasion of Belgium by Germany was justified, also that the submarine warfare carried on by Germany was right and legitimate, and that the sinking of the Lusitania was justified, on account of its carrying arms, munitions, and supplies."

The sixth count charged that the defendant, on the 22d of February, 1918, in the district of Arizona, did willfully attempt to cause similar insubordination, disloyalty, mutiny, and refusal of duty, in that he did, in the presence of William B. Cramer and other persons to the grand jurors unknown, make this statement:

"That Germany is not as much of an autocracy as the United States, because the United States does not permit criticism. There is not as much danger of revolution in Germany as in the allied countries, including the United States."

Assuming, but not holding, that the court below was correct in overruling the demurrers to the above-stated counts of the indictment, a careful reading of the record satisfies us that it was in error in not granting the motion that was made on behalf of defendant at the conclusion of all the evidence, and direct a verdict for the defendant.

The record shows that the plaintiff in error, who is a native of

Sweden and a graduate of the University of that country in chemistry, geology, and mineralogy, came to the United States in 1896, since which time he has been pursuing his profession in this country, Mexico, and Canada, having been much of the time in the employ of the Phelps-Dodge Corporation as consulting metallurgist, in which capacity he was employed at the time of his indictment and arrest. It appears that in December, 1912, he made application for admission to citizenship of this country; that he has three brothers who are such citizens, and two nephews who volunteered in the United States Navy. And while he admits in his testimony that, prior to the entry of the United States into the war, his sympathies were in favor of Germany as against England, there is a total lack of any showing in the evidence of any incriminating act on his part, other than the statements made by him to the several persons named in the indictment, in each instance in the course of private conversation while the two were traveling companions and friends, and in neither instance in the presence of any third party. In each instance there is some difference between the testimony of the witnesses for the government and that of the defendant in the case regarding his statements to them, and it is, of course, clear that for the purposes of our decision we must accept as correct their testimony as against his.

The first and fifth counts of the indictment, as will have been seen, relate to statements alleged to have been made by the defendant to Robert E. Cameron, in the first of which the charge is that the defendant said:

"That our entry into the war was brought about by the Wall Street interests, in order to protect our foreign loans to the Allies."

And in the other of those counts the charge is that he said to Cameron:

"That the invasion of Belgium by Germany was justified, also that the submarine warfare carried on by Germany was right and legitimate, and that the sinking of the Lusitania was justified, on account of its carrying arms, munitions, and supplies."

The substance of the testimony of Cameron, and the whole of it as stated in the record, is as follows:

"I am 36 years of age; am the testing engineer for Phelps-Dodge; have known Dr. Sandberg four years. We talked about the war on two occasions, December 6 and 26, 1917, on the way from Douglas to Bisbee. He talked almost continuously about the war, saying that the United States was more autocratic than Germany, because it suppressed criticism. He said the American people thought the income tax was higher in Germany, but that taxes were getting much higher in the United States, and the people would not stand for it. He talked about Dr. Dye, formerly assistant manager of the Phelps-Dodge Corporation, being in the diplomatic service, and having gone to Norway to investigate conditions in Sweden, and that he might see Dr. Dye over there, as he had a position there, if he could get out with his stuff. He explained 'his stuff' as meaning his notes. He said he would not take his money to Sweden, as American money is only worth 60 cents on the dollar. He said the submarine warfare was right and legitimate. His reasons for it I do not remember. He said the sinking of the Lusitania was right, on account of it carrying munitions to the Allies." The witness said he did not remember whether these statements were made in 1915 or 1916. He said he

did not mention it to any one for a long time afterwards. "He said the American diplomatic service was about as useful as a bunch of 10 year old boys. I do not know what Dr. Sandberg's intentions were in talking about the war, and did not think about it at that time. I did not mention the conversation to any one, except to one party, until the Secret Service asked me about it, three months after the first conversation, and two months after the second."

The mere perusal of that testimony shows that it contains nothing even tending to support the charge in the first count of the indictment, even if it could be held that the statement there counted on was anything more than the mere expression of opinion; and so far as the testimony of the witness goes to sustain the statements alleged in the fifth count to have been made by the defendant, they having been made long prior to the enactment of the law upon which the indictment is based, it is obvious that they cannot be held to have constituted any crime.

In support of the second count is the testimony of the witness Graham, which is as follows:

"My name is Edward M. Graham: am 38 years old; represent W. S. Tyler Company, manufacturers of mining machinery. I have known August Sandberg for four—about four—years in a business way. He talked once with me regarding this war, July 22, 1917, at the Gadsden Hotel, in Douglas, Ariz., starting the conversation. No one else was present. He (Mr. Sandberg) said that Germany had a more democratic government than the United States; that the people had greater liberties in Germany. He gave me the name of a book to read on that subject. The name of the book was 'Comparison of Constitutional Law' by Prof. Burges. He referred me to another book concerning England in the war by Thompson. That was in connection with England being to blame for the war.

"He stated that it would be a great blow to civilization if Germany should lose the war; that President Wilson was pro-British, and led the American people into the war." Witness said he did not know whether the statements made with reference to governments, including Germany and ours, were true or false. He did not mention it to any one for a long time afterwards.

The third count is based upon what the defendant is alleged to have said to Broughton, whose testimony, given in support of that charge, is as follows:

"I am 30 years old. I know Dr. Sandberg in a business way. He talked with me about the war in the office of the test mill at Bisbee, between December 5 and December 10, 1917, and also in June or July, 1917. Dr. Sandberg said to me that in a speech that the President had made he said that America and the Allies will fight Germany and her Allies until the German people will overthrow the present form of government and establish a democratic form, and will not make peace with the present rulers of Germany. He said the President was wrong in saying that, because the German people did not want a different form of government; that their form of government was more democratic than the government of the United States; that President Wilson had more powers than the Kaiser; that President Wilson could declare war, and the Kaiser could not. He said the President had a weak character in allowing the British to dictate his policies and the President to make speeches on those policies, so the people would back the President up in his policies. The witness said there was an article written in a magazine, the 'Review of Reviews,' November 17th, by Frank Simonds, entitled 'England's Great Fight.' Part of this article was about the gradual wearing away of the male members of the German army, or the killing off of the male Germans. Mr. Simonds compared the present conflict with a hare and hound chase. Hounds are em-

ployed to run down a hare, one hound would run the hare until he was tired, and then the second hound would take up the chase, and so on. France was compared to the first hound, England to the second, and the United States the third. The United States was to deliver the final blow, or kill the males of the German army. He said it was the most brutal thing he ever heard of; that it was like the American savage of long ago; that, if that was the opinion of the American people, it showed a very uncivilized people. He said the President had a weak character in allowing the British to indicate his policies. He said that, if the American people were of the opinion of the writer, it showed a very uncivilized people. This conversation was called out by a magazine containing the article lying on my desk, and Dr. Sandberg saw it. One other thing I can remember he said, when I told him about the things I had been through in training camp, as a reserve officer in the regular army. He said the rate of deaths per thousand in the cantonments in the Middle West was very high, much more as to number, as he remembered, in this country, than they were in his country, when they were mobilized."

Witness said he did not regard any of the statements as an attempt to influence him to be unpatriotic, and that the discussion came up, and that there was no feeling manifest one way or the other. He said that he had full confidence in Dr. Sandberg in every way; that he had no suspicion whatever that Dr. Sandberg, the defendant, was an enemy of the country, and that his conduct and what he said did not lead him to believe that he was attempting to hinder the operation of the war. He did not mention it to any one for quite a long time afterwards.

The sixth and last count is based upon what the defendant is alleged to have said to Cramer, whose testimony is as follows:

"One statement Dr. Sandberg made on or about February 13, 1918, I remember very well, and in particular was that he said to his mind the entry of the United States into the war was brought about by Wall Street interests, for the purpose of protecting our loans to the Allies. He stated that Germany was perfectly justified in the invasion of Belgium and made the inference—(Worsley objected to the inference. Objection sustained by the court.) And stated that it was a well-known fact that, if Germany had not invaded Belgium, France or England had planned to go through Germany in that way. He stated that the sinking of the Lusitania was justified, inasmuch as it carried arms and munitions, and when I remarked to him, 'Can you possibly say that that you think the sinking of the Lusitania was justified?' he said quite heatedly that Germany had not started this submarine warfare until England had strewn the North Sea with mines, and that we read only of boats and people lost as the result of German submarines, but heard nothing of the ships that went down as a result of the laying of mines in the North Sea. He stated that to his mind the ruthless submarine campaign of Germany was all right. He stated that Germany was not as much an autocratic country as the United States; that there was a whole lot more danger of revolution in the allied countries, including the United States, than in Germany. He stated that Germany and the Kaiser did not start the war, and went on to explain that the Kaiser did not have the power to start the war, as he had to be backed by the Reichstag and the Bundersrath, and he laid the blame for the war particularly on England. He said England was to blame for the war. He said Earl Gray was to blame for the war. He said he did not think President Wilson was doing right, appealing to the German people to overthrow the Kaiser, and stating, as the President did at that time, that he would not consider making peace with the present ruling powers. He said that President Wilson was wrong for stating that in states like Alsace-Lorraine it was to be left to the people with what large powers they were to be allied.

"A great many of the statements that Dr. Sandberg made on that day were much the same as made 10 days before, and in addition the doctor delivered a

very interesting discourse on the history of the formation of the German Empire, and he traced that from the time of inception up to the present, and enlightened me on a great many points I had not known as to the powers of the Reichstag and the Bundersrath, and the form of their government."

The witness stated that no one else was present. The witness stated that it did not cause him to have any disloyal feelings towards his country. The witness stated that he was 37 years old, and not of draft age. The witness said that he did not mention anything about the matter for about 3 weeks afterwards. Witness said he did not know absolutely whether the statements made by the defendant were true or false. It is obvious that almost all of the last-quoted testimony relates to statements in no way connected with that charged in the sixth count.

Bearing in mind the fact, already alluded to, that in each instance the several statements made by the defendant were made in the course of private conversation, to a friend and traveling companion, and in neither instance in the presence of any third party, and after carefully considering the language of the defendant so used, we can but regard it as mere matter of opinion, which does not fairly come within the provisions of the act of Congress upon which the indictment is based.

The judgment of the court below must therefore be and hereby is reversed.

(257 Fed. 648)

GALBREATH et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. December 8, 1918.)

No. 3130.

1. BANKS AND BANKING ⟹257(3)—OFFENSES.

In a prosecution against the president of a national banking association and his successor, under Rev. St. § 5209 (Comp. St. § 9772), for directing false entries in the books with intent to deceive and for misapplication of funds, evidence *held* sufficient to sustain a conviction.

2. BANKS AND BANKING ⟹256(1, 3)—OFFENSES—INTENT.

In a prosecution, under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of a national banking association for misapplication of funds and for directing false entries in the books, a showing that the false entries were made with intent to deceive, and that the misapplications were made to injure or defraud bank, is essential to conviction.

3. BANKS AND BANKING ⟹257(4)—NATIONAL BANKING ASSOCIATION—OFFENSES.

In a prosecution, under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of a bank for making false entries in the books and misapplying funds, evidence *held* sufficient to carry to the jury the question whether the entries were made with intent to deceive and the misapplications with intent to injure or defraud the bank.

4 BANKS AND BANKING ⟹256(3)—NATIONAL BANKS—OFFENSES.

An intent to injure or defraud a national banking association by misapplication of funds, which offense is defined by Rev. St. § 5209 (Comp. St. § 9772), is not inconsistent with the desire for the ultimate success and welfare of the bank, and such intent may, within the meaning of the law, result from an unlawful act voluntarily done, the natural tendency of which is to injure the bank.

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5. CRIMINAL LAW ⟹1144(17)—APPEAL—PRESUMPTIONS—JUDGMENT.
Where there is one good count in the indictment, and the evidence is sufficient in law to support it, and judgment is such as might have been imposed upon it alone, the presumption is that it was imposed upon the good count, supported by evidence, and will not be reversed, though there are bad counts, or counts unsupported by evidence.

6. BANKS AND BANKING ⟹257(3)—NATIONAL BANKS—OFFENSES—EVIDENCE
In a prosecution under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of the national bank for misapplying funds and making false entries in the books, which practices occurred in connection with loans and advances to a company in which those officers were interested, the admission in evidence of parts of the record in bankruptcy proceedings of such company, showing it was adjudicated a bankrupt on admission in writing that it was entirely insolvent, and that dividends of only 10 per cent. were paid, was proper, though the last transaction charged in the indictment occurred six months before the bankruptcy.

7. CRIMINAL LAW ⟹369(1)—EVIDENCE OF OTHER OFFENSES—REMOTENESS.
In a prosecution under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of a bank for misapplying its funds and making false entries in the books in connection with loans and advances to a company which became insolvent, evidence of similar transactions occurring two or three years before those set forth in the indictment is admissible, over the objection of remoteness.

8. CRIMINAL LAW ⟹1153(6)—REVIEW—EVIDENCE—SECONDARY EVIDENCE.
The sufficiency of proof of loss of records to warrant the admission of secondary evidence of their contents is primarily addressed to the trial judge, whose findings should not be disturbed, unless plainly wrong.

9. CRIMINAL LAW ⟹402(1)—SECONDARY EVIDENCE—LOSS OF BOOKS.
In a prosecution against the president and another officer of a bank for misapplication of funds and the making of false entries in the books in connection with loans and advances to a corporation which became bankrupt, testimony by an expert accountant, who had examined the books and records of the company which became a bankrupt, and had made summaries thereof, *held* admissible on proof of loss of such books and records.

10. CRIMINAL LAW ⟹1169(5)—HARMLESS ERROR—EVIDENCE—INSTRUCTIONS.
In a prosecution against the president and director of a bank for making false entries and misapplication of funds in connection with loans to a company which became bankrupt, the admission of evidence of the contents of books and records of such bankrupt was not error, where the court charged there was no presumption that defendants knew the contents of such books, and that the evidence could be considered only to the extent it was shown defendants did have knowledge of the contents.

11. CRIMINAL LAW ⟹400(8)—EVIDENCE—SECONDARY EVIDENCE.
In a prosecution against officers of a national bank, who were charged with making false entries, etc., an expert accountant may testify as to summaries which he made of the contents of such books, in connection with loans to a company which became bankrupt and whose books were lost; the fact that the accountant reversed certain items in making his summary not rendering the testimony inadmissible, where the changes were explained to him by the jury.

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Elmer E. Galbreath and Charles H. Davis were convicted of violating Rev. St. § 5209 (Comp. St. § 9772), declaring that every president, director, and cashier of any national banking association, who

embezzles, abstracts, or misapplies any moneys, or makes any false entries in any book, etc., shall be punished, and they bring error. Affirmed.

Walter M. Shohl, Froome Morris, and Miller Outcalt, all of Cincinnati, Ohio, for plaintiffs in error.

Edward K. Bruce, Asst. U. S. Atty., of Cincinnati, Ohio.

Before KNAPPEN and DENISON, Circuit Judges, and WESTENHAVER, District Judge.

WESTENHAVER, District Judge. Plaintiffs in error, referred to herein for convenience as defendants, were jointly indicted April 10, 1913, for alleged violation of section 5209, Revised Statutes of the United States (Comp. St. § 9772), the material parts of which section are copied in the margin.[1] The indictment contains 28 counts, and a general verdict of guilty was rendered upon all of them, and each defendant sentenced to imprisonment for a term of 7½ years. This proceeding is to reverse that judgment.

The transactions upon which the several counts of the indictment are based cover a period from October 3, 1910, to December 12, 1911, and consist of 14 different transactions. Each one is made the basis of 2 counts. Davis was president of the Second National Bank of Cincinnati, Ohio (hereinafter referred to as the bank), during the period covered by these transactions until early in 1911, after which he was chairman of its board of directors. Galbreath was vice president of the bank and succeeded Davis as president. The transactions in question were in connection with the Ford & Johnson Company, sometimes hereinafter called the company.

The first 7 counts charge misapplication of certain funds of the bank, and the third 7 counts charge false entry on the books of the bank in connection with the same transaction. They are based on alleged misapplication of funds by use of what are called in the record "transfer checks," and false entry on the books by carrying these checks as currency. The second 7 and the fourth 7 counts are based on overdrafts in the Ford & Johnson Company account; the first group charging that these overdrafts were misapplication of funds, and the last group that they were abstraction of funds.

The misapplication counts, 1 to 7, inclusive, are all similar in character, so that a statement of one will do for all. This first count charges that on November 8, 1910, the Ford & Johnson Company presented to the bank and received credit for a check of $30,000 drawn by it on the Cincinnati Trust Company, at which time the Ford & Johnson Com-

[1] Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association, * * * or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, * * * shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

pany had no money to its credit in the trust company, and that said check was not presented by the bank to the trust company for payment, but was held and carried as currency in the bank until December 13, 1910, when it was withdrawn from the bank, having been paid by check drawn by the Ford & Johnson Company on the bank and from a loan made to it by the bank. The remaining counts, 2 to 7, inclusive, are of the same general character, involving checks drawn at intervals between December 13, 1910, and November 24, 1911, for amounts ranging from $2,000 to $7,500, and being similarly held without presentation for payment for from 1 to 3 months.

The third group of 7 counts, 15 to 21, inclusive, charge that these 7 different checks were carried on a book of the bank, known as the "Receiving Teller's Cash Book," as currency during the time they were so withheld from presentation for payment, and that, therefore, false entries were thereby made in a book of the bank with intent to deceive the National Bank Examiner. As to the remaining counts based on misapplication and abstraction by means of overdraft, we deem any specific statement unnecessary.

[1] The errors assigned are that a verdict of not guilty should have been directed as to both defendants, and the judgment should therefore be reversed, because the evidence was not sufficient to sustain a conviction as to any of them, that the court erred in one respect in its charge, and that it erred by the admission of sundry items of evidence. The error mainly urged and relied on is that the verdict is without sufficient evidence to support it. Defendants' contention is that the evidence does not connect either of the defendants with any of these transactions, and that there is no evidence of any intent to injure or defraud the bank. This contention calls for an examination of the evidence, and this we have done with care. In our opinion there was sufficient evidence to go to the jury, and to sustain a conviction as against both defendants. A brief review of the outstanding facts will show the reasons for our conclusion.

Defendants' counsel, as we understand, do not assert that these transactions, if they occurred as alleged, were not misapplication of the funds of the bank, and were not false entries. The contention is that the several witnesses who testified thereto left it uncertain as to who authorized and directed the misapplication and the false entries, and that upon the familiar rule that, where the evidence shows a crime to have been committed by one or the other of two defendants, but does not show which, a verdict of guilty is not sustained as against either. The evidence here does not seem to us to be of that indefinite nature.

Davis, as has been already stated, was president of the bank until early in 1911; he then became chairman of the board of directors at a reduced salary. Galbreath was vice president, and succeeded Davis in the presidency. These two persons were, during all the time under investigation, in the active management and control of the bank's business; they were its executive heads and managers. The cashier, assistant cashier, receiving teller and the vice president all testified in the case. They testified that all these transfer checks, and the false entry thereof on the receiving teller's book as cash, were authorized and di-

rected by one or the other of the two defendants. No witness was able to say as to any one transaction that it was directed by Davis or by Galbreath, but all say that the directions were given by one or the other; that all were handled and directed from the front office—that is, the president's room, which was occupied by Davis, while he was president, and adjacent to which was the desk of Galbreath; that no other officer or person connected with the bank either claimed or exercised any authority or direction in connection therewith; that whichever one was present or accessible whenever a transaction of this kind had to be passed on did so; that the practice of handling and directing these transactions by one or the other of the defendants was so well known that all minor bank officers or employés went direct to them, and not to their immediate superior.

The representative of the Ford & Johnson Company, namely, George V. Cutter, its secretary, when necessity arose for a favor of this kind from the bank, would apply direct either to one or the other of the defendants, and the transfer check, with proper deposit slip and directions to carry as cash, would be transmitted to the bookkeeper and receiving teller from the front office. There was testimony that the cashier would be called to the president's office, sometimes Davis would be there, sometimes Galbreath, sometimes both of them, and he might not know what the conversation had been, or what the arrangements were, but one or the other would hand him a transfer check, tell him to make out a deposit ticket, deposit it to the credit of the Ford & Johnson Company, and have the receiving teller hold it as cash. The answers of the witness so testifying, and of others, that he was unable to remember whether it was Davis or Galbreath who handled each or any specific transaction, does not limit or qualify this evidence. The jury was warranted in inferring that at least some of these transactions were handled jointly by the defendants in the manner described.

The learned trial judge in his charge, however, gave defendants the full benefit of the law as they contend it is, and in effect directed a verdict of acquittal as to the transfer check and false entry counts, unless the jury found that there was a plan or agreement between the two defendants that these several transactions should be handled in this way. There was, in our opinion, sufficient evidence to warrant a finding that there existed a general plan or system, to which both defendants were parties, to use the bank's funds in this way by transfer checks for the benefit of the Ford & Johnson Company.

Both defendants during all the time in question were large stockholders in the Ford & Johnson Company. Davis was a director of the company as early as 1907, and its vice president, drawing a salary of $4,000 a year from 1908 until as late as September, 1910, if not later. Galbreath was its treasurer downward from 1908 to March, 1910, and drew a salary of $3,000 a year. The evidence tends to show that both were active in its financial management; Galbreath especially was fully informed concerning its affairs, so much so that, after he ceased to be treasurer, one of the experts examining into its affairs says he could always get information from him about any matter as to which all other persons seemed to be unfamiliar.

In the fall of 1909, and perhaps earlier, the Ford & Johnson Company was in serious financial difficulties. It was unable at times to meet its pay rolls; its account at the bank was frequently, if not continuously, overdrawn in large amounts; the needs of its daily business were financed from "hand to mouth" with the assistance of the bank; it was losing money on the business done, and was getting deeper into debt. The evidence tends to show familiar knowledge of these difficulties by both defendants. Furthermore, between July, 1908, and October 1, 1909, the Ford & Johnson Company engaged in a series of transactions of more than doubtful propriety, with which both defendants must have been familiar, and which have an important relation to the transactions under consideration.

The company created a number of subsidiary companies, transferred to each of them some of its assets, taking in exchange therefor capital stock of the subsidiary companies. This capital stock had no value behind it, except the assets transferred from the parent to the subsidiary companies, and the valuation placed thereon for the purpose of issuing stock was approximately $1,250,000 in excess of the book value of these assets. This capital stock was made the basis for an issue of what is called gold trust notes; that is, the Ford & Johnson Company issued gold trust notes in the sum of $1,000,000, payable in 1919, pledging this capital stock alone as security therefor. These notes, although carried in the statements of the company as outstanding obligations for which value had been received, payable in 10 years, were never in fact sold, but were pledged as security for demand or short time paper. A part of the large indebtedness of the Ford & Johnson Company to the bank had no other security back of it, except these gold trust notes.

The extent of the indebtedness of the company to the bank, in addition to the transfer check transactions, is not definitely shown, but was admittedly large, and in excess of the amount permissible under the law to be made to any one customer. The Comptroller of the Currency and the national bank examiner during this period complained frequently of this indebtedness, called attention to these excessive loans, and stated that there was serious danger of loss. This correspondence need not be summarized, but the evidence shows that it came to the attention of both defendants, and that they joined in representing that the company's affairs were in good shape and that it was reducing its obligations. Both assumed to have knowledge of the financial condition of the company.

Many transactions similar to those described in the first to the seventh counts are shown to have taken place. They began as early as the fall of 1909, and continued thenceforward to and during the period covered by the indictment. They were all handled, authorized, and entered in the same way. Ordinary overdrafts were passed on by the cashier, but overdrafts and transfer checks of this company were handled and passed on only by one or the other of the defendants. These transactions were not brought to the attention of the board of directors. So far as the evidence shows, the board of directors was informed only once, and that on August 26, 1910, that the company's account was overdrawn. A loan of $25,000 on the security of assigned accounts re-

ceivable was then authorized, on condition only that an overdraft for $64,000 be similarly secured. Davis and Galbreath were both present at this meeting.

This is by no means all the evidence tending to show a plan or system, and the joint participation of the defendants therein, of using the bank's funds in this manner for the benefit of the Ford & Johnson Company. On the whole testimony, we are of opinion that the court below was warranted in submitting the case to the jury, and that the jury was warranted in finding that defendants jointly participated in all these transactions.

[2, 3] The criminal intent with which these acts must have been done, in order to warrant a verdict of guilty, differs as to the false entry counts from the misapplication counts. As to the former, the intent required to be proved is that the false entries were made with intent to deceive any officer of the association, or any agent appointed to examine its affairs, while, as to the misapplication counts, the intent, to be criminal, must have been to injure or defraud the bank. Defendants' counsel, although urging that the evidence is insufficient to show a criminal intent, seem to limit their argument to a lack of evidence to show any intent to injure or defraud the bank. An intent to deceive by these false entries is plainly inferable from the facts proved. The evidence shows that the receiving teller's cash book is a book of the bank, that in due course of business there is entered therein the cash on hand, distributed under headings, gold, silver, currency, and cash items; that to carry these transfer checks as cash required them to be entered either as gold, or silver, or currency, and not as a cash item. The only correct entry of these checks would have been to have included them among cash items, in which event the full nature of the transaction would have appeared upon the receiving teller's cash book. The necessary or reasonably probable effect of entering them as currency was to deceive any agent or examiner.

This intent to deceive is further evidenced by the fact that no funds to meet these checks were in the Cincinnati Trust Company during the time they were thus carried; also by the fact that in one instance, perhaps more, currency was got from the trust company on a transfer check, and held in preparation for a visit of the bank examiner, and returned later after his departure, and the transfer check taken back and held thereafter as currency until later canceled in the usual manner.

The contention that the evidence is not sufficient to show an intent to injure or defraud is in part covered by the foregoing summary of the evidence. Certain additional contentions with respect thereto are made. It is said Davis was ill for some period not definitely shown prior to August 15, 1910, and that thereafter he passed less time at the president's office, and took a less active part in the conduct of its affairs, and that after retiring from the presidency and becoming chairman of the board of directors early in 1911 he was absent on a trip for his health for a period variously stated as a month, six weeks, or two months. It is also said that an operating committee in September or October, 1910, took charge of the affairs of the Ford & Johnson Company, and that what was done thereafter in the conduct of its business

was done with the approval of this committee, and could not have been done otherwise by the defendants, or either of them, than in entire good faith, and without any intent to injure or defraud. From this premise, and the fact that the transactions described in the indictments occurred after the operating committee took charge, it is argued that the evidence fails to show sufficiently any criminal intent.

The trial judge charged the jury that Davis could not be held for any transaction in his absence and not personally participated in by him, unless they found beyond a reasonable doubt that a general plan or agreement existed between him and Galbreath whereby the acts of one bound the other, even while absent. He also instructed the jury that if the defendants acted honestly and in good faith, for what they believed to be the advantage and protection of the bank, they could not be convicted, although they may have exercised bad judgment in managing and in conducting its affairs, and that mistakes made in good faith and in an honest belief do not constitute a crime. He summarized fully all defendants' contentions, tending to show that they were acting in good faith and without intent to injure or defraud. The charge of the court in this respect is not complained of.

This operating committee, so called, was created in September or October, 1910. Neither Davis nor Galbreath was a member of it. Louis A. Ireton, attorney for the Cincinnati Trust Company, and Charles M. Leslie, attorney for the bank, were members of it. These two members had charge principally of its financial affairs after the committee was constituted. The creation of this committee arose in this wise. In March, 1910, when Galbreath ceased to be treasurer of the company, a man named Powell succeeded him. Powell had become connected with the company on the basis of representations contained in a report of an audit company made up in October, 1909, and on representations as to its condition made by its officers, including Galbreath and Davis. He obtained loans amounting to $200,000 from banks with which he had friendly business relations. He became convinced that the report of the audit company and the representations made to him were incorrect, and procured an audit to be made by an expert accountant. This disclosed that the liabilities were much in excess of what had been represented; that the company's account at the banks was overdrawn $95,000; that the gold trust notes, apparently issued for real money and payable in 1919, had not been sold, but had been pledged on demand or short time paper, and were in fact a current, instead of a deferred, liability. Feeling that he had been imposed upon, and that he had innocently involved friendly banks in the sum of $200,000, he called a meeting of officers of the company, and of the bank, and of the Cincinnati Trust Company, which it seems was involved similarly with the Second National Bank. Davis was not present, but Galbreath was.

All this information, and more, reflecting on the solvency and business methods of the company, was disclosed by Powell at this meeting. It was then agreed that notes would be given for $200,000, to be indorsed by Davis, Galbreath, and others, to take up the loans which Powell had procured, and he thereupon severed his connection with

the company. Davis signed these notes, and the evidence tends to show that he was present at a meeting of the directors of the company on August 15, 1910, and at the bank on August 26, 1910, and regularly thereafter. Everybody concerned, subsequent to the date of this meeting, seemed to have known that the Ford & Johnson Company was on the verge of insolvency and collapse. The general understanding was that if its affairs were well managed it might pay creditors dollar for dollar, but stockholders would get nothing. Leslie and Ireton concerned themselves with its financial operation. They saw that the money received was applied in payment of bills, determining which ones should be paid. The evidence does not show that they knew anything of the transfer check transactions which had been indulged in between the company and the bank previously, or at any time while they were serving on the committee; in fact, the evidence tends to show that they did not. George V. Cutter, secretary of the company, who prior thereto had conducted these transactions with the defendants, continued to do so thereafter. No transfer check issued and credit taken on the books of the bank and falsely held as currency was ever authorized as a result of any request or with the knowledge of the committee, or any member of it. The defendants alone were responsible, so far as the evidence shows, at all times therefor.

[4] It was for the jury to say whether or not an intent to injure or defraud was shown or repelled by these extenuating circumstances. An intent to injure or defraud, as contemplated by the statute, is not inconsistent with a desire for the ultimate success and welfare of the bank. It may, within the meaning of the law, result from an unlawful act voluntarily done, the natural tendency of which may have been to injure the bank. A wrongful misapplication of funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted, is none the less a violation of the statute, if the necessary effect is or may be to injure or defraud the bank. Such is the well-settled law. United States v. Harper (C. C.) 33 Fed. 471; United States v. Kenney (C. C.) 90 Fed. 257; United States v. Breese (D. C.) 131 Fed. 922, 923.

The bank had become heavily involved as a result of previous irregular acts in which the defendants had participated. They had involved themselves with the Comptroller and bank examiner by representations and statements concerning the bank's loans to the Ford & Johnson Company and the condition of its business. They may have thought that, if the plan and method of misapplying funds by transfer checks and falsely entering these checks as cash were ended, the Ford & Johnson Company would go to the wall, dragging down the bank with it, and bringing upon themselves as stockholders in both, and as responsible agents of the bank, loss and censure. In any event, whether or not a criminal intent existed was properly submitted to the jury, under a charge fair to the defendants, and its verdict should not be disturbed.

[5] In view of the conclusion thus reached respecting the transfer check and false entry counts, we deem unnecessary a consideration of defendants' contentions respecting the overdraft and abstraction

counts. The sentence was general, and such as might have been imposed for a conviction on any count. The law is settled that if there is one good count, and evidence sufficient in law to support it, and the judgment such as might have been imposed upon it alone, the presumption is that it was imposed upon the good count, supported by evidence, and will not be reversed, even if there are bad counts, or counts not supported by the evidence. If we were of opinion that these counts were not supported by the evidence, we would feel that this rule should be applied, and an examination, therefore, of the evidence is unnecessary, and will not be made. Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Hardesty v. United States (C. C. A. 6) 168 Fed. 25, 93 C. C. A. 417; Bartholomew v. United States (C. C. A. 6) 177 Fed. 902, 101 C. C. A. 182; Bennett v. United States (C. C. A. 6) 194 Fed. 630, 114 C. C. A. 402.

One error assigned and urged in the brief is that the court failed to charge, as specially requested, that the law presumes the character of the defendants to be good and that such presumption is evidence in their favor. On the hearing this assignment was withdrawn; counsel admitting that Mullen v. United States (C. C. A. 6) 106 Fed. 892, 46 C. C. A. 22, which was cited in support of it, is not to be taken as the law, in view of Greer v. United States, 245 U. S. 559, 38 Sup. Ct. 209, 62 L. Ed. 469.

[8] Error is assigned to the admission in evidence of certain parts of the record in the bankruptcy proceedings of the Ford & Johnson Company. In April, 1912, this company was adjudged a bankrupt upon an admission in writing by resolution of its board of directors that it was absolutely insolvent and unable to pay its debts. This admission in writing, its schedule of liabilities showing its indebtedness to the bank, and the order showing the payment of a dividend only of 10 per cent. were thus admitted over objection and exception. It is urged that, inasmuch as six months had elapsed from the last transaction charged in the indictment, that changes were shown to have taken place in the assets of the company, and that in any event the amount realized by a bankruptcy sale of assets is no fair test of value, these items were irrelevant, and the admission thereof was prejudicial to the defendants. The date and fact of bankruptcy, and the percentage distributed on debts, however, had already appeared in the testimony without objection or exception. Evidence had also been given showing the financial condition of the company, and the changes in its assets, and their value from year to year, both during, before, and after the period covered by the transactions described in the indictment.

The trial judge told the jury that the guilt or innocence of the defendants was to be determined upon a consideration of the facts and circumstances as they existed at the times mentioned in the indictment; that they must not answer that question by looking back in the light of their present knowledge, but that they must transport themselves to the dates specified, and consider the position of the defendants as it then was, and the situation, facts, and circumstances then existing, and which were then known to them. They were also

told that the amounts realized from a bankruptcy sale of assets were not to be taken as any evidence of the value thereof at the time of sale, or any prior time. They were also charged that the bankruptcy proceedings, on account of the difference in time, should be entirely disregarded as to the transfer check and false entry counts. In our opinion, in view of these considerations, the admission of this evidence does not constitute prejudicial error, even if immaterial and irrelevant.

[7] Error is also assigned to the admission in evidence of similar transactions. It is said that some of them thus admitted were too remote, and that others were not similar. The other transactions admitted in evidence were similar. The transfer checks were issued by the company, held without presentation for payment, and entered on the receiving teller's cash book as currency, in precisely the same manner as those under consideration. The only difference in any of them is that some of the transfer checks were drawn on a different bank. The evidence tends to show that from October, 1909, with great frequency, down to and including the period covered by the indictment, such transactions took place. In our opinion, none of these transactions were too remote, and all were admissible in evidence in accordance with well-settled rules. 12 Cyc. 411; Jones on Evidence, § 142; Griggs v. United States (C. C. A. 9) 158 Fed. 572, 85 C. C. A. 596; Hardesty v. United States (C. C. A. 6) 168 Fed. 25, 93 C. C. A. 417; Prettyman v. United States (C. C. A. 6) 180 Fed. 30, 103 C. C. A. 304; Hoss v. United States (C. C. A. 8) 232 Fed. 328, 146 C. C. A. 376; Shea v. United States (C. C. A. 6) 236 Fed. 97, 149 C. C. A. 307, and cases therein cited.

[8, 9] Error is also assigned to the admission in evidence of certain testimony given by one Walter Lewis, an expert accountant. This witness had examined the books and records of the Ford & Johnson Company in 1912, and had prepared certain summaries and schedules therefrom. One of them was an operative statement of assets and liabilities year by year, beginning July 1, 1905, and continuing to April 30, 1912. The other showed the profit and loss of its operations by fiscal years, beginning June 30, 1905, and ending April 30, 1912. One objection is that the books and records were not produced in court or made accessible to the defendants. Many witnesses were called to prove the loss of these books and records. The sufficiency of this evidence, so as to dispense with the necessity for their production, is addressed primarily to the trial judge. His finding should not be disturbed, unless plainly wrong (Jones on Ev. § 214), and, in our opinion, his finding is not only not wrong, but is fully sustained by the evidence. Conceding that the proper rule requires that books and records should be produced, or at least made accessible to the opposing parties, in order to render admissible this class of the testimony, it is none the less true that when such books are lost, or are beyond the jurisdiction of the court, the rule applicable to lost documents and the admission of secondary evidence is also applicable in that situation. Wigmore on Evidence, § 1230; Burton v. Driggs, 20 Wall. 125, 135, 136, 22 L. Ed. 299; Jones on Evidence, §§ 211, 217.

[10] Another objection is that the defendants were not shown to be

familiar with the contents of these books and records. The financial condition of the company and whether it was making or losing money were relevant matters of inquiry. The trial judge told the jury that there was no presumption that either defendant knew the contents of these books and records, and that such contents were to be considered only to the extent the evidence tended to show the defendants had knowledge of what was thereby disclosed. In our opinion, the admission of this evidence, taken with these instructions, was not error. Wilson v. United States (C. C. A. 2) 190 Fed. 427, 437, 111 C. C. A. 231; Bettman v. United States (C. C. A. 6) 224 Fed. 819, 831, 832, 140 C. C. A. 265; Sparks v. United States (C. C. A. 6) 241 Fed. 777, 154 C. C. A. 479.

[11] Another objection urged to the admission of this testimony is that the witness, in making up his schedule, reversed certain entries on the books, thereby reducing its assets. The most striking instance of this consisted in shrinking the value of the capital stock received from subsidiary companies in exchange for assets of the parent company to the figure at which these assets had been carried on the company's books. This and other changes made by him were fully explained to the jury, and in view of such explanations, and the instructions of the court, it does not seem to us that any confusion could have been produced in the minds of the jury, nor any prejudice could have resulted therefrom to the defendants.

Finding no prejudicial error in the record, the judgment is affirmed.

(257 Fed. 659)

MEMPHIS ST. RY. CO. v. PIERCE.

(Circuit Court of Appeals, Sixth Circuit. March 10, 1919.)

No. 3171.

1. APPEAL AND ERROR ⟹1064(1), 1067—HARMLESS ERROR—INSTRUCTIONS.
   In an action by a negro passenger, wounded in an exchange of shots between the conductor and another negro passenger, giving of instructions on the conductor's right to shoot in self-defense, and the refusal to charge thereon as requested, *held* not error prejudicial to the street railway company.
2. CARRIERS ⟹321(23)—CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—INSTRUCTION.
   In an action against a street railway for the wounding of a negro passenger in a shooting affair between the company's conductor and another negro passenger, instruction *held* not erroneous, in view of all the facts and circumstances, and a discussion between counsel, as telling the jury it was a proven or admitted fact that the conductor came into the car without reason and deliberately started a fight with the negro.
3. TRIAL ⟹295(1)—INSTRUCTIONS—CONSIDERATION AS A WHOLE.
   Instructions must be considered as a whole.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by John P. Pierce against the Memphis Street Railway Company. To review a judgment for plaintiff, defendant brings error. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Sam P. Walker, of Memphis, Tenn., for plaintiff in error.
Milton J. Anderson, of Memphis, Tenn., for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and KILLITS, District Judge.

KILLITS, District Judge. By law, street railways in Tennessee are required to separate the races by placing white passengers in one end of a car and colored passengers in the other, passengers of either race being compelled to remain within the half of the car reserved to them, unless it should happen that it had been filled and seats remained in that part of the car set off to passengers of the other race. The result of the regulation is that vacant seats, if any, in either half of the car will be those nearest the center. The car which figures in this case had a side door; it was a trailer in charge of Conductor Bullock, the motorcar being in charge of Conductor Bright. The plaintiff, Pierce, was a colored man seated towards the rear, that being the half assigned to colored passengers. As the car left the center of the city of Memphis, there were many vacant seats in each half, but a white passenger, one Barker, instead of turning to the right and seating himself among the whites, insisted on taking the first seat to the left of the door in the colored section. The car began to fill with a preponderance of colored passengers until there was but one seat remaining in the negro end, that beside Barker. A colored woman entered and undertook to sit beside him; her action being met by his strong objection. Thereupon a negro passenger named Knox came up from the rear, giving his seat to the colored woman, and engaged in an altercation with Barker, in which some profanity was used, and which Conductor Bullock could not quell. The latter thereupon gave the ordinary stopping signal for the street which the cars were approaching and opened the door, to order both Knox and Barker from the car. When the train stopped, Conductor Bright came from the front car, and firing began between him and the negro Knox, who was killed. One of Bright's shots hit Pierce, who had no part in the transaction, and it is for injuries by him sustained that this action was brought against the defendant, plaintiff in error here, which seeks to reverse the judgment against it following the verdict.

The assignments in error, four in number, are predicated upon alleged errors of the court relating to the charge to the jury. The first, third, and fourth may be grouped together and thus disposed of, having been argued in that collocation by plaintiff in error's counsel. It is first urged that what the court said to the jury on the subject of self-defense was erroneous under the circumstances of the case, and that the court erred in refusing to give certain requests upon this subject which are the subjects of the third and fourth assignments. The court's charge on self-defense excepted to was as follows:

"In order for you to determine the rights of the parties, it is necessary for the court to instruct you upon the law of justifiable homicide as applicable to the facts in this case. In the first place, the conductor, Bright, would be justified in shooting the negro, John Knox, if he did so in self-defense, and on that subject I charge you as follows:

"If the conductor, Bright, was in real or apparent danger of death or great bodily harm, or honestly believed himself to be in such danger, as evidenced by the facts and circumstances justifying such a belief as they appeared to him, and in acting in good faith under such an apprehension he shot and killed the negro, John Knox, and at this time accidentally wounded John Pierce, the court charges you that this is justifiable homicide; and if you believe that the conductor, Bright, acted in the honest belief and was justified by the circumstances, then you must find for the defendant.

"Considering the self-defense theory, which is relied upon by the defendant, you will first look to all the facts and circumstances in the case, and if from that you believe that the conductor, Bright, came to the trailer car door, and, without more, the passenger, Knox, fired at him, or drew his pistol to fire at him, and the conductor shot at him in self-defense under such circumstances, and the ball missed and struck the plaintiff, then the company would not be liable.

"But, on the other hand, if you believe that there was some controversy between Knox and a white man who was sitting on the seat with him, and that when the car stopped, and the conductor, Bright, came to the door with his pistol, or drew it as he got to the door, and threw it on the negro and told him, 'Hands up,' and the negro arose and drew his pistol and fired, then he was acting in self-defense; the company would be liable, and under such circumstances it would be immaterial whether Knox fired first or the conductor first, because under such conditions he would be the aggressor and could not avail himself of the plea of self-defense."

[1] The requests to charge on this subject were much more extended and discussed various theories alleged to be derived from the evidence and which the jury should examine. We are of the opinion that there was no error prejudicial to the plaintiff in error respecting either the court's charge or the refusal to charge as requested. It is conceded by counsel for plaintiff in error that the court's statement of the general principle of self-defense embodied in the second paragraph of the charge, as quoted above, was correct, but that the court's application of this principle by reference to the facts of the case, as set out in the third paragraph, was erroneous, because it withdrew from the jury, as alleged, a consideration of such movements or demonstrations as the negro Knox may have made which "would show to a reasonably prudent man that he had a pistol and was about to use it." Bright, who killed Knox, and shot Pierce, was not a witness, so that it was left to inference altogether as to what he saw or thought he saw by way of a hostile demonstration on the part of Knox. It is shown in the evidence that Bright stepped into the car with a drawn pistol in his hand, leveled at Knox, coupled with a threatening order. The evidence clearly preponderates that the first hostile demonstration was made by Bright. There is some conflict upon the question, but the best interpretation of the evidence leads to the conclusion that Knox fired first, his bullet striking Bright's money change box and thus saving him from injury, whereupon Bright started a fusillade into the rear of the car, resulting as above stated. The result, in our judgment, is that the request to charge on the subject of self-defense, tendered by the defendant below, so far departed from the actual evidence in the case as to tend to lead the jury into abstruse speculation as to what was in Bright's mind when he fired. In our judgment, the court employed the only concrete application of the general principles of the law of self-defense possible here. We think that to have

given the request of the defendant below might very well have had the result of confusing the jury, and whatever may be said by way of legitimate criticism of the court's charge—we are not suggesting that it is subject to criticism—in view of the whole charge this instruction did not tend to defendant's prejudice. The excerpt from the court's charge on the subject of self-defense, which was excepted to, and which we quote above, was not all the court said on the subject. A paragraph immediately followed directing the jury's attention to the consideration "whether Knox was acting as if he were in the attitude of assaulting any one." The effect of this, with later portions of the charge, alluded to below, was to present to the jury, in a clear way, all of the substance of defendant's request which the state of the evidence justified.

[2] Having first insisted that Bright shot in self-defense, it was further urged in his behalf that the shooting occurred while Knox was attempting a felony. In discussing this question, the court again invited the jury's careful scrutiny of the evidence bearing upon Knox's conduct, in which every right of the defendant below was well safeguarded. In the course of this instruction, the jury's attention was called to the law of Tennessee separating the races, and this part of the charge concludes with this paragraph which is the basis of the remaining assignment of error:

"That is what this trouble seems to have arisen from, but what was its condition, what was the intensity of it at the time the conductor on the front car came back? There is no evidence in that case that explains why he came back, or what induced him to come back. The car bell was rung to stop in the ordinary way for a stop, as the conductor testified there was no call made for any help; and you must apply your good common sense and judgment in determining just what was going on at the time this shot was fired that struck this plaintiff."

It is argued that this was extremely prejudicial, "for the reason that the court, in substance, told the jury that it is a proven or admitted fact that Conductor Bright came back from the motorcar without any reason and deliberately started a fight with the negro John Knox." This criticism does not appeal to the court as valid, nor do we see error in this charge, viewed in relation to all the facts and circumstances of the case, and especially when considered with a subsequent discussion of this subject between counsel for defendant below and the court in the presence of the jury and which was, in fact, part of the instructions. This discussion was as follows:

"Mr. Walker: I except because the court stated that there was no evidence in the case to cause Bright to return to the trailer car. I submit that there was a question as to whether or not there was sufficient evidence in the case to warrant Bright's return to the trailer car.

"The Court: I don't recall any direct evidence that showed what moved him to leave. It may be inferred from all the evidence in the case. There may be reasonable inference as to why he went back, and the jury may look to all the evidence in determining what caused him to go back. He is not here to speak on that subject."

[3] These considerations dispose of this case. There is no dispute as to the law applicable to this situation. The law of self-defense is well known. We must consider the instructions of the court as a

whole. So regarded, they are found to conform to well-settled law and there is no ground for inference that the jury was misled. We see no fair opportunity to presume that, if the criticisms of plaintiff in error to this charge were met in a new presentation of the same facts to a jury, the verdict might reasonably be otherwise than it was here.

The judgment of the court below, therefore, must be affirmed. Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306; Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489.

(257 Fed. 663)

SOUTHERN RY. CO. v. PETTIT et al.

(Circuit Court of Appeals, Sixth Circuit. January 15, 1919.)

No. 3188.

1. CARRIERS ⟹25—REGULATION OF SHIPMENTS—RULES OF INTERSTATE COMMERCE COMMISSION—"BURNT COTTON."

Rule of the Interstate Commerce Commission providing that burnt cotton, which is cotton that has been on fire, and which has not been subsequently repicked and rebaled, must not be offered for shipment until it has been reconditioned, or until not less than five days have elapsed since the last evidence of fire therein, does not forbid shipment of cotton which had been part of a larger mass that had been on fire after five days elapsed, merely because there was fire in other cotton about 200 yards distant at the time of the shipment.

2. CARRIERS ⟹136—CARRIAGE OF GOODS—EVIDENCE.

In an action against a railroad company for the value of burnt cotton, which was destroyed while in transit, the question whether the cotton was on fire at the time of the shipment, or whether it caught on fire while in transit, *held* one of fact for the jury.

3. CARRIERS ⟹134—DESTRUCTION OF SHIPMENT—VALUE—EVIDENCE.

In an action for the value of burnt cotton, which was destroyed while in transit after it had been salvaged, testimony by witness of large experience in buying and selling burnt cotton as to its value, based on the market value of merchantable cotton, *held* competent and sufficient to support a verdict for damages, though the witness did not state the cost of reconditioning the cotton, on which his estimate of value had been based; that being matter for cross-examination.

4. APPEAL AND ERROR ⟹1048(6)—REVIEW—HARMLESS ERROR.

In action for the value of burnt cotton, which was destroyed in transit after it had been salvaged, refusal to permit cross-examination of plaintiff as to the amount paid for the cotton, which the carrier desired to introduce on the question of value, *held* harmless; there being no showing of the expense of handling, salvaging, repicking the cotton, etc.

5. CARRIERS ⟹132—CARRIAGE OF GOODS—LOSS BY FIRE—BURDEN OF PROOF.

Where a carrier accepted for shipment burnt cotton that had been salvaged, and the bill of lading acknowledged the receipt of the shipment in apparent good order and free from fire, and there was evidence that it had been free from fire five days previous, there is a presumption that the failure of the carrier to deliver the cotton which burned during transit was due to its fault, and refusal to charge that before the shipper might recover he must show some evidence of negligence on part of the carrier, was proper.

6. APPEAL AND ERROR ⟹719(7)—REVIEW—ASSIGNMENT OF ERROR.

Where burnt cotton, which had been salvaged, was destroyed while in transit, and no inherent defect or vice was suggested, except the existence

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of smouldering fire, and that was fully covered by the charge, the refusal of a request that there could be no recovery if the fire originated because of inherent defect or vice of cotton will not be considered on appeal; no assignment of error having been taken, and the case not being one where the court should, under rule 11 (202 Fed. viii, 118 C. C. A. viii), review the ruling without an assignment.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by Hugh Pettit and the Newberger Cotton Company against the Southern Railway Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Earl King, of Memphis, Tenn., for plaintiff in error.

Julian C. Wilson, of Memphis, Tenn., for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and KILLITS, District Judge.

KNAPPEN, Circuit Judge. On May 6, 1916, defendants in error, hereinafter called plaintiffs, shipped over the line of plaintiff in error, hereinafter called the carrier, from Decatur, Ala., consigned to Memphis, Tenn., several carloads of "salvaged cotton"; that is to say, cotton which had been in a fire. During transportation, three of the carloads, aggregating 56,801 pounds, were burned up. This suit was brought for the recovery of its value. The carrier, in addition to general denial, pleaded that the loss was occasioned through plaintiff's negligence, and, by counterclaim, asked recovery for the injury to its equipment, etc., by reason of the fire, which was alleged to have been due to plaintiffs' negligence, in that the cotton was loaded into the cars while still containing fire, and without the exercise of due care, and in not ascertaining that it contained fire. There was a trial to a jury, and verdict and judgment for plaintiffs for $5,021, as the value of the cotton; the counterclaim being rejected.

[1, 2] 1. The Gulf Company's compress at Decatur, Ala., was burned April 25, 1916. Previous to the fire, there were in the compress about 9,000 bales of cotton; a portion of this was bought by plaintiffs on May 2d, which was four days before the shipment in question. A rule of the Interstate Commerce Commission provides that—

"'Burnt cotton' is cotton that has been on fire, and which has not been subsequently repicked and rebaled. It must not be offered or accepted for shipment at an originating station until it has been reconditioned by picking and repacking in bales, or until not less than five days have elapsed since the last evidence of fire in it. It must be marked and described on shipping orders and bills of lading as 'Burnt cotton, yellow label,' and cars containing any quantity of it must be protected by the inflammable placard."

The bill of lading acknowledged receipt of a large number of both bales and bundles of "burnt cotton," with notation "Inflammable placard applied, yellow label." Its conditions, as respects interstate shipments, were made subject to the provisions of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [Comp. St. § 8563 et seq.]). The waybills for the shipments were each marked "Inflammable." One covered 13 bales and 40 bundles, another 62 bun-

dles, the third 65 bales, of "burnt cotton." There was testimony that the cars bore the "inflammable placards." At the conclusion of the testimony, defendant moved for directed verdict in its favor, upon the ground that it conclusively appeared that the plaintiff broke the Interstate Commerce rule by shipping cotton within five days since the last evidence of fire in it, that in fact there was fire smouldering in it when loaded, that plaintiff was thus guilty of negligence, and that the cotton was consumed as the result of this smouldering fire.

This motion was properly overruled. There was substantial and competent testimony tending to show that the cotton was free from fire when shipped and for more than five days before. This testimony is not subject to the criticism of being merely an expression of opinion, as distinguished from actual knowledge. The officer of the Salvage Company, which took charge of the cotton on the 25th of April, testified to his segregating bales that had been on fire, "handling them individually, and examined every one of them," piling it, inspecting it, and repiling three times for the purpose of discovering fire; that in the case of baled cotton, which appeared little affected by fire, the affected portions were pulled out, water applied with a hose, and the existence of heat further tested by the hand; these tests were applied for several days. Unpressed cotton was saturated with water, raked into winrows, reraked, resaturated, and finally packed into sacks; that while the inspection was made by men in charge of it, as well as himself, he inspected all of it personally, and saw personally that all precautions were taken; that to the best of his knowledge "the fire was absolutely out two days before it was offered for sale," which would be six days before the shipment in question. The testimony of the witness was clear and emphatic.

One of the plaintiffs testified to his personal charge and examination of all the cotton previous to shipment and its freedom from fire when shipped. The testimony of conscientious witnesses could not well go further. There was other testimony tending to the same result. There was some testimony tending to show the contrary, but the motion to direct verdict did not involve the rule of weight of affirmative as opposed to negative testimony. There was, however, an item of testimony that at the time of the shipment there was fire in some cotton situated about 200 yards from the cotton in question, and if this testimony is to be accepted as conclusive, and if the Commission's rule is to be interpreted as forbidding shipment within five days after the existence of fire in any part of an originally larger mass, plaintiffs' testimony as to the absence of fire was possibly not definite enough to cover such situation; but we cannot so interpret the rule, which merely forbids the shipment of "cotton that has been on fire * * * until not less than five days have elapsed since the last evidence of fire in it." There was affirmative evidence, on the carrier's part, tending to show that the cars were fire-tight and that the engine's equipment effectually excluded the possibility of fire from sparks; but, while this testimony was not directly contradicted, it merely raised a question of fact. It did not, in our opinion, necessarily exclude all reasonable possibility that the cotton was free

from fire when loaded, even though the other theory might seem to us the more probable.

[3] 2. It is urged that there was no evidence on which to base the verdict, in that there was no competent testimony of the value of the cotton. The contention is that the test is market value, and that the testimony of one of plaintiffs (the only witness on the subject) was merely a guess. This contention must be rejected. It appeared that the market value of merchantable cotton is based on the Memphis Cotton Exchange price of upland middling; the higher grades bringing more, the lower grades less, than middling. The witness, who had had large experience in buying and selling burnt cotton, testified that, while there was no exchange price for burnt or irregular cotton, there was a market value for it; the value being based on the Memphis Exchange price for regular cotton, taking into account the cost of reconditioning, etc. He testified generally that the value of the burnt cotton, when reconditioned, would be from one-half a cent to one cent less than middling cotton (whose exchange price, from May 6 to May 23, ranged from 12½ to 13 cents), and that the cotton in question was "mostly high grade." He further said that the cotton which was not burnt in transit was, on reaching Memphis, divided into three grades: White, stained and burnt; the burnt pickings selling at 7¼ cents without being reconditioned; the stained cotton, for the most part, at 10½ to 11 cents as fast as conditioned; the baled cotton was said to be worth 1½ or 2 cents more than the loose or sacked cotton. After saying that "this very cotton" would be worth 12 to 12¼ cents after it had been reconditioned, in answer to a question what it was worth "as a whole" on May 10th or 11th, at the time it "ought to have arrived," he answered, "About 10½ or 11 cents a pound" (the recovery was at about 9 cents a pound). We think it fairly open to inference that the cotton consumed in transit was intended to be covered by that answer, notwithstanding the interpolated query of the witness, "As it was when it arrived here?" The cost of reconditioning was not stated, nor the relative proportions of the three grades; but these were matters open to cross-examination, and their omission affected only the weight of the testimony of value at Memphis. The average value given by the witness was apparently intended to be based upon the market price, as shown by the quotations at the time the cotton should have reached Memphis, less the cost of reconditioning and making it marketable. This we think proper, in view of the experience of the witness.

[4] Complaint is also made that defendant was not permitted to show by cross-examination what plaintiffs paid for the burnt cotton at Decatur. Assuming, for the purposes only of this opinion, that its admission would not have been error, we think there was no reversible error in rejecting it. The testimony of amount paid (it was not bought by the pound) would be of no substantial value, in the absence of complete showing of the expense of handling, salvaging, and repicking at Decatur, the proportion of the cotton wholly lost in that operation, the cost of the transportation to Memphis, and the expenses of reconditioning and reselling.

[5] 3. Error is assigned upon the refusal to charge that, "before the plaintiff in the original suit can recover, he must show some evidence of negligence upon the part of the railroad company," and upon the instruction that the burden was on defendant to show (in order to relieve itself from liability for loss of the cotton) that plaintiff delivered, for shipment, the cotton afterwards burned within five days after the last evidence of fire in the bulk of the cotton.

The carrier would not be liable for fire caused by plaintiffs' fault. Not only did the bill of lading acknowledge the receipt of the shipment "in apparent good order, * * * which said company agrees to carry to its usual place of delivery at said destination," but plaintiffs had given affirmative oral testimony tending to show, not only that the cotton was in good shipping condition when received by the carrier, and free from fire, but that it had been so free for more than five days before. The nondelivery by the carrier raised the presumption that the cotton had been lost through its negligence, and the burden was thus cast on it to show that the fire, and consequent failure to deliver the cotton, was due, not to its fault, but to plaintiffs' fault: Galveston, etc., Ry. Co. v. Wallace, 223 U. S. 481, 492, 32 Sup. Ct. 205, 56 L. Ed. 516; Chicago, etc., Ry. Co. v. Collins Co. (C. C. A. 7) 235 Fed. 857, 863, 149 C. C. A. 169.

[6] 4. Defendant complains of the failure to charge that, "if the fire originated by virtue of the inherent defect or vice of the cotton shipped," the defendant must have verdict. No error was assigned on the failure to give this request; and, under our rule 11 (202 Fed. viii, 118 C. C. A. viii), we are not called upon to consider it. We see no occasion to exercise discretion in its favor. No "inherent defect or vice" is suggested, except the existence of smouldering fire; and that subject was fully covered by the court's charge. Indeed, that defendant's counsel so understood is indicated by its assignment of error in the charge "that the burden of proving that the fire in question was occasioned by the inherent vice of the property was upon the defendant."

Finding no reversible error in the record, the judgment of the District Court is affirmed.

(257 Fed. 667)

ERIE R. CO. v. SCHLEENBAKER.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1919.)

No. 3199.

1. MASTER AND SERVANT ⟹285(7)—INJURY TO RAILROAD EMPLOYÉ—MOVING DEFECTIVE CAR—PROXIMATE CAUSE—QUESTION FOR JURY.

In an action by a conductor, injured when he missed the grabiron on the caboose, from which the rear lights had been removed, and fell under the following car, on which the caboose lights had been placed, and which was at the rear of the train because it had no drawbar or coupler at its rear end, such hauling of the crippled car being unlawful under Act March 2, 1893, § 2 (Comp. St. § 8606), Act March 2, 1903, § 1 (Comp. St. § 8613), and Act April 14, 1910, § 5 (Comp. St. § 8622), and constituting negligence, question of whether the transportation of the defective car was the proximate cause of the conductor's injury *held* for the jury.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. MASTER AND SERVANT ⟹111(1)—INJURIES TO RAILROAD EMPLOYÉ—HAULING DEFECTIVE CAR.

A railroad was negligent in hauling at the rear of a freight train, back of the caboose, a freight car, defective in that it had no drawbar or coupler on its rear end, an act unlawful under Act March 2, 1893, § 2 (Comp. St. § 8606), Act March 2, 1903, § 1 (Comp. St. § 8613), and Act April 14, 1910, § 5 (Comp. St. § 8622).

3. MASTER AND SERVANT ⟹111(1)—INJURIES TO RAILROAD EMPLOYÉ—HAULING DEFECTIVE CAR.

The effect of a railroad's violation of its duty under Act March 2, 1893, § 2 (Comp. St. § 8606), Act March 2, 1903, § 1 (Comp. St. § 8613), and Act April 14, 1910, § 5 (Comp. St. § 8622), in hauling at the rear of a freight train, back of the caboose, a freight car, defective, in that its rear end was without drawbar or coupler, and also any liability arising therefrom, extended to an employé, such as the conductor of the train.

4. MASTER AND SERVANT ⟹204(2), 228(2)—RAILROAD EMPLOYÉS—EMPLOYERS' LIABILITY ACT—SAFETY APPLIANCE ACT—CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

The purpose of Congress, through the Employers' Liability Act (Comp. St. §§ 8657–8665), and the Safety Appliance Acts (Comp. St. § 8605 et seq.), considered together, is not only to make a railroad's duty absolute, but also, where the injury is in part occasioned by the failure of the road to comply with the acts, to excuse employés from the effect alike of the rules of contributory negligence and assumption of risk.

5. TRIAL ⟹343—VERDICT—FORM AND EFFECT.

Verdict for plaintiff, under instructions that only three issues were to be considered, must be treated as general in form, and as finding all the submitted issues in favor of plaintiff.

6. APPEAL AND ERROR ⟹1078(4)—ASSIGNMENT OF ERROR—WAIVER BY FAILURE TO MENTION IN BRIEF.

Where nothing is said in the brief in support of an assignment of error to the reception of evidence, it must be regarded as waived.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by Jacob Schleenbaker against the Erie Railroad Company. To review judgment for plaintiff, defendant brings error. Affirmed.

J. Paul Lamb, of Cleveland, Ohio, for plaintiff in error.

Lewis Brucker, of Mansfield, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]) to recover damages for personal injuries sustained by plaintiff below, Schleenbaker, on the 8th of September, 1915, and while in the employ of the defendant railway company. Admittedly defendant was at that time operating as a common carrier of passengers and freight in interstate commerce by railroad, and plaintiff was the conductor of one of its freight trains. This train was then running on a west-bound trip between Kent and Marion, Ohio, and pursuant to orders previously given by defendant a freight car was coupled to the rear end of the caboose of plaintiff's train at Ashland. The car thus becoming the last one of the train had no drawbar or coupler at its

rear end, and under the orders mentioned was to be hauled to Marion for purpose of repair; it was, moreover, loaded with interstate freight, and, like the rest of the train, being used in interstate commerce. The placing of the crippled freight car at the end of the train necessitated removal of the markers, whether for day or night travel, from the rear end of the caboose to that of the freight car. The train proceeded to Galion and left there about 9 p. m. In attempting to board the caboose while in motion, plaintiff tried and failed to obtain a hold upon the rear grabiron which was bolted to the side of the caboose, and fell so that his left arm lay across the adjacent rail of the track; the wheels on that side of the defective car passed over his arm and practically severed it between the wrist and elbow.

Among the negligent and wrongful acts charged in the petition as causing the injury were violations by defendant of the federal Safety Appliance Acts (Act March 2, 1893, c. 196, 27 Stat. 531, Act March 2, 1903, c. 976, 32 Stat. 943, and Act April 14, 1910, c. 160, 36 Stat. 298 [Comp. St. § 8605 et seq.]), in transporting the defective car, which ran over plaintiff's arm, and in maintaining an improper grabiron on the caboose. At the close of all the evidence motion of defendant to direct a verdict in its favor was denied; and the court in charging the jury instructed them that only three issues were to be considered: (1) Whether the transportation of the defective car was the proximate cause of plaintiff's injury; (2) whether the grabiron in question had the required minimum clearance, two inches; and (3) if it had not whether the injury was proximately caused by such defect in the grabiron. The court further charged that if the jury should find the affirmative either of the first or of the second and third of the issues, the plaintiff was entitled to recover. Verdict was returned and judgment rendered for plaintiff, and defendant seeks reversal under the writ of error.

[1-3] The assignment of error relied on was the refusal to withdraw from the jury consideration of the first issue above alluded to. The insistence is that the absence of a coupler and drawbar at the rear end of the freight car had no connection with the infliction of plaintiff's injury and hence, as matter of law, could not have been the proximate cause. This is amplified in several ways, and finally by contention that plaintiff would have met with the same injury if a perfect car, instead of the crippled car, had been attached to the rear of the caboose. This may be conceded, and yet it does not meet the case in hand. The caboose was at the rear end of the train, the usual position of such a car, until the crippled car was placed behind it, and it is to be remembered that this attachment of the crippled car was not due to a mere yard or switching movement. The train was running on the main west-bound line and in the course of a regular trip. The ordinary and natural position of a perfect car would have been ahead, not to the rear, of the caboose; a car without drawbar or coupler could not, consistently with the Safety Appliance Acts, have been so placed and transported in the train. 36 Stat. 299, § 4 (Comp. St. § 8621); Erie R. Co. v. United States, 240 Fed. 28, 32, 153 C. C. A. 64 (C. C. A. 6).

Application of the doctrine of proximate cause is always difficult. Efforts to solve the question by illustration generally complicate the subject through doubtful analogy, and at last right solution is found to depend upon the facts and circumstances of the particular case. Hence, what is the immediate and operating cause of an injury usually presents a question of fact. Brief mention of the circumstances of plaintiff's injury will, we think, disclose a satisfactory test of the trial judge's refusal to decide the question of proximate cause as matter of law. The defective condition of the car was at once the reason for hauling it to a place of repair and for attaching it to the rear of the caboose; this resulted, as before pointed out, in a removal of the lights from the rear of the caboose to the rear of the defective car; these conditions were apparently unusual, and calculated to render performance of the conductor's duties more difficult, not to say dangerous. It was dark when the conductor attempted to board the caboose; when the train started, he was near its forward end, engaged in the discharge of his duties. He proceeded toward the rear of the moving train, and when he reached the caboose the train had attained a speed of 6 to 8 miles an hour; carrying his lantern as the only means of light to aid him, he attempted, as before stated, to catch the rear grabiron of the caboose and to mount the steps of its platform; but missing the grabiron, he caught the railing at the rear of the platform, and was thrown between the caboose and freight car, and injured as already described. Now, bearing in mind the changed conditions under which the conductor sought to board the caboose, it is to be observed that the vital condition, the one without which plaintiff would certainly not have lost his arm, was created by the unlawful act of the company. This unlawful act consisted in hauling the freight car in its crippled condition. 27 Stat. 531, § 2 (Comp. St. § 8606); 32 Stat. 943, § 1 (Comp. St. § 8613); 36 Stat. 299, § 5 (Comp. St. § 8622); Great Northern Ry. Co. v. Otos, 239 U. S. 349, 351, 352, 36 Sup. Ct. 124, 60 L. Ed. 322. The act also constituted negligence on the part of the company. San Antonio Railway v. Wagner, 241 U. S. 476, 484, 36 Sup. Ct. 626, 60 L. Ed. 1110; St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, 294, 295, 28 Sup. Ct. 616, 52 L. Ed. 1061. Moreover, according to the very terms of the statute, such hauling was "at the sole risk of the carrier" (36 Stat. 299, § 4 [Comp. St. § 8621]); and the effect of the violation of duty involved as also the liability arising therefrom, extended to an employé such as the plaintiff conductor (Louisville & Nashville R. R. Co. v. Layton, 243 U. S. 617, 621, 37 Sup. Ct. 456, 61 L. Ed. 931).

[4] Coming, now, to the question of causal relation between the negligence and the injury, can it, for example, be safely said as matter of law that plaintiff would have failed in his attempt to board the rear platform of the caboose if the lights usually carried at that end of the car had been present? Clearly the aid that such lights would have furnished plaintiff, or, stated in another way, the effect of their absence, presented an inquiry of fact. The removal of the lights was in furtherance of the unlawful act of hauling the defective car. Such removal would seem to have been a step in the line of natural and con-

tinuous sequence resulting from the unlawful act of hauling; and it need not be repeated that without such unlawful hauling and the negligence it implied the injury would not have occurred. It is not an answer to say that plaintiff knew of the conditions. The purpose of Congress, through the Employers' Liability Act and the Safety Appliance Acts, considered together, is not alone to make the defendant's duty absolute, but also, where, as here, the injury is in part occasioned by the failure of the carrier to comply with the acts mentioned, to excuse the employés from the effect alike of the rules of contributory negligence and assumption of risk. 35 Stat. 66, §§ 3 and 4; Grand Trunk Ry. Co. v. Lindsay, 233 U. S. 42, 49, 50, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168; Great Northern Ry. Co. v. Otos, supra, 239 U. S. at page 352, 36 Sup. Ct. 124, 60 L. Ed. 322. Defendant's motion to direct a verdict in its favor was therefore rightly denied. This, after all, is but to apply the principle declared by Mr. Justice Strong in Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

Our court has had frequent occasion to apply this rule, as, for example, Winters v. Baltimore & O. R. Co., 177 Fed. 44, 50, 100 C. C. A. 462; Erie R. Co. v. White, 187 Fed. 556, 559, 560, 109 C. C. A. 322; Hales v. Michigan Cent. R. Co., 200 Fed. 533, 537, 118 C. C. A. 627; Heskett v. Pennsylvania Co., 245 Fed. 326, 329, 157 C. C. A. 518.

[5, 6] We may add that the contentions made under decisions relied on by the railway company must fail for lack of analogy between the facts there involved and the facts of the instant case, and that the remaining assignments of error which have been argued do not point to anything that seems to us prejudicial to the company. The verdict must be treated as general in form, and as finding all the submitted issues in favor of the plaintiff. Error is assigned to the receiving of evidence concerning the second and third issues as to the condition of the grabiron, but nothing is said in the brief in support of such assignment, and it must therefore be regarded as waived. Wege v. Safe-Cabinet Co., 249 Fed. 696, 705, 161 C. C. A. 606 (C. C. A. 6).

The judgment is affirmed, with costs.

(257 Fed. 671)

ROBBINS v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1919.)

No. 3204.

1. RAILROADS ⟹350(1)—INJURIES ON TRACK—NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad for a death on its track at a crossing, withdrawal from the jury of the question of the railroad's negligence *held* erroneous, in view of the testimony.

⟹For other cases see same topic & KEY NUMBER in all Key-Numbered Digests & Indexes

2. DEATH ⟹58(1)—PRESUMPTION—EXERCISE OF CAUTION.
The law presumes that one killed on a railroad crossing followed the instinct of self-preservation, and exercised due caution, and looked and listened for approaching trains; a presumption which is disputable and must yield to convincing evidence.

3. RAILROADS ⟹350(13)—DEATH ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
In an action against a railroad for a death on its track, question of decedent's contributory negligence *held* for the jury.

In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by Charles Robbins, administrator of the estate of Dinna Beamer, deceased, against the Pennsylvania Company. To review a judgment for defendant, plaintiff brings error. Reversed, with direction to award new trial.

Francis R. Marvin, of Cleveland, Ohio, for plaintiff in error.

Thomas M. Kirby, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Suit for the negligent killing of decedent. At the conclusion of plaintiff's testimony the trial court directed verdict for defendant.

The main street in the village of Nevada, Ohio (which we shall call Main street), runs north and south. It is crossed at right angles by defendant's railroad right of way, on which were at least two tracks. On each side of Main street there was a cross walk over the railroad right of way. According to the tendency of the proof, decedent, who was 19 years of age, at about 8:10 p. m. of December 27th left the house of her friend, which was on the east side of Main street and 50 or 60 feet south of the railroad tracks, for the purpose of mailing a letter at the post office, which was on the west side of Main street and on the north side of the tracks. She expected to return to her friend's house immediately on mailing the letter. At the time she started on this errand the south track was occupied by a long and slowly-moving east-bound freight train. At about the time the caboose at the rear of this freight train passed out of the street, an engine drawing a short, west-bound freight train on the northerly track, and running at a speed of 55 to 60 miles an hour. suddenly burst into view, without ringing of bell or blowing of whistle. The proof tended to show that it was this west-bound train on the northerly track which struck and killed decedent.

The grounds on which the verdict was directed were, first, that plaintiff had not sustained the burden of showing that defendant's alleged negligence was the direct and proximate cause of decedent's death; and, second, that decedent conclusively appeared contributorily negligent.

The place where the collision occurred is material on the question both of defendant's and of decedent's negligence. No one saw dece-

dent after she left her friend's house, and the point of collision is left to inference. The language of the trial judge in directing verdict suggests that he thought the collision must have occurred at the east crossing. However that may be, we think the inference more natural that it occurred at the west crossing. To say the least, such inference is entirely permissible. It is supported by the considerations, first, that, the post office being on the west side of Main street decedent would naturally, to save time, pass over to the west crossing while the freight train was going past, even though there was no planked crossing on the south side of the tracks; second, the first evidence of the place of collision, in the way of fragments of decedent's body, was found, two hours later, 100 feet west of the west crossing and between the rails of the north track.

[1] In our opinion it was error to withdraw from the jury the question of defendant's negligence. But two witnesses testified to seeing the two trains. Neither gave the precise situation of the trains at a given moment, beyond the fact that both were between the two street crossings at the same time, and within the limitations about to be stated. One testified that the caboose of the east-bound train "was on the crossing about the same time as the engine of the west-bound train," and later that the "caboose of the train going east and the engine of the train going west I would estimate as occupying the foot crossing on the east side at the same time, but it might have been a little farther east and it might have been a little farther west." The other testified, in substance merely, that the "east-bound train when I first saw the west-bound train, was going across the crossing; going east across the crossing. The rear part of the east-bound train was crossing the crossing when the west-bound train came into view. By that I mean about the caboose part." And again: "So that the engine of the west-bound train and the caboose of the east-bound train were on some portion of the highway at the same time." The fact that decedent, a telephone operator—there being nothing to indicate that she was not at least of ordinary intelligence and in the possession of her faculties—coming from the south, was struck by an engine suddenly projected without warning bell or whistle from the east across the main street of the village at the speed stated (which would require less than one second to cross an ordinary four rod street), concealed at first from decedent's view by the presence of a long freight train in front of her, which also muffled the sound of the west-bound train, would clearly support an inference that defendant's negligence in so operating its west-bound train was the direct and proximate cause of the accident.

[2, 3] As respects the charge of contributory negligence: The trial judge thought decedent must either have crossed behind the east-bound train immediately on its clearing the sidewalk, when she was not in position to see the west-bound train, or have gone ahead without looking to see whether a train was coming from the east. This conclusion is not, in our opinion, inevitable, at least on the theory that the collision occurred at the west crossing. Defendant had the burden of proving decedent's negligence. The law presumes that

following the instinct of self-preservation she exercised due caution, and that before crossing the tracks she looked and listened for approaching trains. Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262; Worthington v. Elmer (C. C. A. 6) 207 Fed. 306, 309, 125 C. C. A. 50; Pittsburgh, etc., R. R. Co. v. Scherer (C. C. A. 6) 205 Fed. 356, 359, 123 C. C. A. 484. True, this presumption of due care is disputable, and must yield to convincing evidence that had decedent looked east after the east-bound train had ceased to obstruct her view she must have seen the west-bound train in time to save herself. Evans v. Railway Co. (C. C. A. 6) 213 Fed. 129, 129 C. C. A. 375.

But such condition does not, we think, conclusively appear. It did not appear how far away the west-bound train could be seen by one standing at the west crossing on the south side of the two tracks. There was no evidence of the condition of the headlight of the west-bound engine, or how far to the east the track was either straight or unobstructed. It affirmatively appeared that the night was dark and the lights in the town poor, and it did appear that buildings completely hid the west-bound train from the view of persons 200 to 400 feet north of the crossing, and on either side of the main street, until the engine was actually "on the crossing." It did not appear what the distance was between the two tracks in question, and as the case stood it was reasonably conceivable that had decedent looked and listened before attempting to cross she might have been struck by the swiftly moving train before she could get out of its way. The sudden appearance without warning of the train on the north track might well have created a confusion accounting for the collision. Pittsburgh, etc., R. R. Co. v. Scherer, supra, 205 Fed. at page 359, 123 C. C. A. 484.

The instant case is in its controlling facts substantially like the Scherer Case, in which we held that the question of contributory negligence was for the jury. The most prominent difference is that in the Scherer Case there was evidence of the movement of later trains on the night of the collision, but in view of the conclusion that the testimony supports an inference that the west-bound train in question was the one which struck and killed decedent, the differences between the two cases are unimportant.

We think the question of plaintiff's contributory negligence should also have been submitted to the jury.

The judgment of the District Court is reversed, with direction to award a new trial.

(257 Fed. 675)

LAKE ERIE & W. R. CO. v. SCHNEIDER.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1919.)

No. 3164.

1. RAILROADS ⟹350(1)—INJURIES AT CROSSING—NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.

In an action against a railroad for injuries to a motor truck owner and driver at a crossing, questions of the railroad's negligence and its effect in producing the accident *held* for the jury.

2. APPEAL AND ERROR ⟹1064(1)—HARMLESS ERROR—INSTRUCTION.

In an action against a railroad for injuries to a motor truck owner and driver at a crossing, where the evidence fairly admitted finding that the view was not so obstructed, and there was not so much noise, as to prevent a careful and prudent person from discovering the train, *held* not prejudicial error to qualify the railroad's requested instruction on plaintiff's duty to stop before crossing to the extent that was done by the court.

3. NEW TRIAL ⟹72—TRIAL ⟹139(1)—CONSIDERATION OF MOTION—WEIGHING OF EVIDENCE.

It was not the province of the trial court to weigh the evidence when passing on motion to direct verdict, but when he came to consider the motion for new trial he was required to weigh evidence.

4. RAILROADS ⟹350(13)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad for injuries at a crossing to the owner and driver of a motor truck, question of plaintiff's contributory negligence *held* for the jury.

5. RAILROADS ⟹327(7)—INJURIES AT CROSSING—DUTY TO STOP.

The owner and driver of a motor truck along a good road, so that the truck was not noisy, in approaching a single-track railroad crossing, was not required as a matter of law to stop to avoid the implication of negligence contributing to his injuries, when struck by a special train running at an unusual time; the view not being so obstructed as to require plaintiff to stop.

6. RAILROADS ⟹346(2)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In the federal courts, the burden to prove the defense of contributory negligence rests upon defendant in a suit for injuries at a crossing.

7. APPEAL AND ERROR ⟹1003—REVIEW OF EVIDENCE BY FEDERAL COURT.

A federal appellate court does not weigh the evidence, though it must be satisfied that there is proper evidence in law sufficient to support the verdict.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by Fred. Schneider against the Lake Erie & Western Railroad Company. To review a judgment for plaintiff, defendant brings error. Affirmed.

Frank S. Lewis, of Toledo, Ohio, for plaintiff in error.

Newcomb, Newcomb, Nord & Chapman, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Plaintiff below, Schneider, recovered verdict and judgment for $3,525 against the railroad company,

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and the latter seeks reversal under the present writ of error. The suit was for personal injuries sustained by plaintiff at the crossing of an ordinary highway, Hawkins road, and the railroad near the village of Fairlawn, Ohio. Hawkins road runs north and south, and the railroad in a southwesterly direction at the crossing and at the places in question here.[1] About 4 o'clock in the afternoon of June 1, 1916, plaintiff was driving his own motor truck north and over the crossing mentioned, when he and his machine were struck and injured by a west-bound train of the defendant company. The usual issues of negligence of the railroad company and contributory negligence of the plaintiff were made in the pleadings and contested by facts and circumstances disclosed by witnesses testifying in open court.

We cannot think it necessary to discuss the various assignments of error set out in the record. A motion made at the close of all the testimony to direct a verdict for defendant was denied. No grounds were stated in support of the motion, but they are to be inferred from exceptions reserved to the court's charge and to its refusal of a particular request. It is objected, for example, that one effect of the court's instruction was to permit the jury to find under the evidence that it was negligence on the part of defendant to operate its train over a country crossing, as here, at a speed of 25 to 30 miles an hour. Upon this subject the court charged the jury at some length, saying among other things:

"Ordinarily, if it [railway company] exercises the duty and degree of care required—that is, ordinary care—to notify and to warn persons of the approach of its trains, it may in the open country operate its trains across a highway at any rate of speed it sees fit, consistent with the safety and the operation of its trains; and the rate of speed will not, in and of itself, without other circumstances tending to impose other duties and obligations on the defendant company, constitute an act of negligence."

[1] The petition alleges, and there is testimony tending to show, that at the crossing the train was running 30 miles an hour without having given "warning of any kind of the approach"; that is, that neither the whistle nor the bell of the locomotive was sounded in approaching or passing over the crossing. The petition also alleges that the railroad is maintained in a cut several feet in depth for some distance east of Hawkins road, and that along the south side of the cut the defendant had permitted weeds and shrubbery to grow upon its right of way; and there is also testimony tending to show that as respects trains approaching the crossing from the east the effect of the cut and growth was more or less to obstruct the view of persons approaching the crossing, as plaintiff was, from the south along the Hawkins road. It is true that the testimony as to warning or not by whistle and bell and as to obstruction of view is in conflict; but these features signified conditions naturally affecting the matter of speed,

[1] The presence of the Garman road, which extends from the Hawkins road in a northeasterly direction and some 30 feet south of the railroad, and its relation to some of the testimony, are not overlooked; but specific discussion of the testimony in that respect would not be helpful to a right understanding of the opinion.

and, when so considered, it is clear enough, under the motion to direct, that the question of defendant's negligence and its effect in producing the accident were matters for the jury. Robbins, Adm'r, v. Pennsylvania Co., 257 Fed. 671, 168 C. C. A. 621, decided by this court March 4, 1919; Zimmerman v. Pennsylvania Co., 252 Fed. 571, 572, 164 C. C. A. 487 (C. C. A. 6); Hales v. Michigan Cent. R. Co., 200 Fed. 533, 536, 118 C. C. A. 627 (C. C. A. 6).

[2] The request made and refused as stated follows:

"If the view of this train, approaching from the east, was obstructed by weeds, shrubs, or trees, or anything else, it was the duty of the plaintiff to stop, if that was necessary, in order to see or hear the approaching train."

This was presented at the close of the general charge, and in its stead the court instructed the jury thus:

"If the situation was such that the plaintiff could not see an approaching train, that imposed upon him a higher degree of care in the exercise of his other faculties to ascertain whether or not a train was approaching. I do not say to you, as a matter of law, that it was his duty to stop his automobile or his vehicle in that situation; but if, not being able to see, and if the noises were such that an ordinarily careful and prudent person would have stopped his car in order to listen before undertaking to cross, then the plaintiff here would be guilty of contributory negligence if he attempted to cross without stopping his car to ascertain whether or not a train was approaching."

[3, 4] These instructions, of course, had reference to the defense of contributory negligence. It will be observed that the instruction refused, as well as the one given in its stead, in terms made the duty of plaintiff to stop before entering upon the track dependent on whether this was necessary to the discovery of the approach or not of a train. Stating the same thing in another way, if an approach could be determined by the sense of sight or hearing, neither instruction purported to impose a duty to stop. Thus far the two instructions are substantially alike. The ultimate difference between them concerned a situation where the question of approach was not clearly determinable without first stopping the motor truck; in that event the request denied imposed the duty to stop as matter of law, while the one given imposed this duty or not according to the standard of ordinary care and prudence. If, then, the evidence was such as fairly to admit of a finding that neither the view was so obstructed nor the existence of noises was such as necessarily to prevent an ordinarily careful and prudent person from discovering the approach of the train, it certainly was not prejudicial error to qualify defendant's request to the extent indicated by the instruction given in its place. It would seem that the safest test of this, to be found in the record, is whether under all the pertinent evidence fair-minded men might honestly draw different conclusions touching the question of caution or fault on the part of plaintiff in approaching and driving upon the track.

Plaintiff appears to have looked and listened with reasonable diligence before entering upon the crossing, but it does not appear that he stopped his machine. It is said that his own testimony "at least tended to show that he was guilty of contributory negligence." This would seem to be true if we consider only what the plaintiff said of the obstruction

to his view as he approached the crossing, and particularly what he said under cross-examination and largely in response to leading questions concerning the effect of some underbrush and small trees upon his view. The extent of the obstruction was a disputed question at the trial. The defendant sought in several ways, among which was the introduction of a map prepared by its own engineer, to show that there was no substantial obstruction to the view; and this attitude of defendant at the trial must be considered in connection with the testimony of the plaintiff, including that elicited through his cross-examination, and indeed with the entire testimony upon the subject.

Moreover, the opportunity to hear the approach of the train is also to be borne in mind in connection with the instruction refused and the one given. It is reasonably clear that the approach of a train was discoverable through the sense of hearing. It is not shown that plaintiff's truck was a noisy machine; he was driving on what defendant's engineer describes as a "cinder road in good condition"—Hawkins road; and while it is true that an automobile overtook plaintiff, sounding its horn, and passed his machine shortly before he reached the track, yet these circumstances were calculated at most to show only momentary diversion of plaintiff's attention and the reasonably low rate of speed at which it otherwise appears he was traveling. Furthermore, defendant filed a motion for new trial based on grounds substantially including the contentions made here; and this is important because of the trial judge's denial of the motion, notwithstanding his opportunity to see the witnesses and hear them when delivering their testimony. It was not the province of the judge to weigh the evidence when passing on the motion to direct, but when he came to consider the motion for a new trial he was required to weigh the evidence. Big Brushy Coal & Coke Co. v. Williams, 176 Fed. 529, 532, 99 C. C. A. 102, and citations (C. C. A. 6). In overruling the motion, Judge Westenhaver said:

> "An examination of the brief and authorities therein cited in support of this motion for a new trial leaves me with the opinion entertained during and at the conclusion of this trial, namely, that the plaintiff's contributory negligence was on the testimony a question for the jury, and that the verdict of the jury is not so manifestly against the weight of the testimony that I would be justified in setting it aside."

[5, 6] This is in accord with our own view of the record. We are the more content with this conclusion for several reasons, which it may not be amiss to add. We cannot say, as matter of law, that the conditions call for the application of the exceptional rule which requires a traveler to stop, as well as to look and listen, before entering upon a railroad crossing. The nature of the crossing now in question, the natural conditions surrounding it, and the circumstances attending plaintiff's attempt to pass over it, all combine to differentiate the instant case from the cases relied on by counsel where the more drastic rule to stop, besides looking and listening, was imposed. This is sufficiently illustrated by the facts disclosed and considered by this court in Shatto v. Erie R. Co., 121 Fed. 678, 59 C. C. A. 1; the present Mr. Justice Day having prepared the opinion.

Further, while the trial judge did not permit the circumstance to in-

fluence his instructions to the jury, it is worthy of notice in testing the conduct of plaintiff that only a single track was maintained at and near this crossing, and that the train in question was a special and run in a direction and at a time quite unusual. The plaintiff was familiar, not only with the place, but also with the schedule and direction of regular trains operated along this portion of the track—two in the morning west bound, and two in the evening east bound. The running of the special, it is true, was in itself lawful; but the facts mentioned were admissible as circumstances tending to explain the degree of care and caution prudent travelers with plaintiff's knowledge of the situation would ordinarily exercise—in a word, whether they would stop in addition to looking and listening—before entering upon the crossing. Again, and it scarcely need be said, the long-settled rule of the federal courts is that the burden of proving the defense of contributory negligence rests upon the defendant. Robbins, Adm'r, v. Pennsylvania Co., supra; Harmon v. Barber, 247 Fed. 1, 6, 159 C. C. A. 219, L. R. A. 1918F, 428 (C. C. A. 6); Texas & Pacific Railway v. Volk, 151 U. S. 73, 77, 14 Sup. Ct. 239, 38 L. Ed. 78.

[7] Our consideration of the assignments, those not specially alluded to, as well as those mentioned, convinces us that no reversible error intervened. Counsel seem to overlook the rule that a federal appellate court does not weigh the evidence, though, of course, the court must be satisfied, as we are here, that there is proper evidence which in law is sufficient to support the verdict.

The judgment must therefore be affirmed, with costs.

(257 Fed. 679)

CITY OF HOLLAND et al. v. HOLLAND CITY GAS CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1919.)

No. 3211.

1. CORPORATIONS ⟹586—HOLDING COMPANY—ACQUISITION OF OWNERSHIP—ASSUMPTION OF OBLIGATIONS.

   Holding company, which acquired control of gas company through ownership of stock and bonds, *held* not to have in effect supplanted the gas company, assumed its obligations, and become the owner of all its rights and property, despite the use made by the holding company of its power to select directors for the gas company, and also certain statements made by the holding company in its prospectus, reports, etc., to its own stockholders.

2. CORPORATIONS ⟹590(1)—CONTROL BY STOCK OWNERSHIP—RELIEF AGAINST CONTROLLING COMPANY.

   Where one corporation acquires a controlling interest in the stock of another, and so secures opportunity alike to benefit or to injure the interests of such other company and its customers, it being engaged in the public business of supplying gas to a community, courts will not hesitate to look into such a situation, the controlled company having become bankrupt, and to grant merited relief against the holding company.

3. BANKRUPTCY ⟹43—RIGHT OF CONTROL OF GAS COMPANY—INTERFERENCE WITH SUIT IN STATE COURT.

   A gas company in a city of Michigan, a majority of whose stock and bonds was owned by a Delaware holding company, no statute either of

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Michigan or Delaware prohibiting such ownership by the Delaware company, was entitled to go into bankruptcy, and its proceedings therein cannot be regarded in judicial contemplation as an undue interference with suit by the city and another against the gas company and the holding company to enjoin an increase in the charge for gas, which the gas company had notified the city was necessary.

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Intervening petition by the City of Holland and Evert P. Stephan to vacate and set aside an order adjudging the Holland City Gas Company a bankrupt, as well as the bankruptcy proceeding itself, against the Gas Company and the Grand Rapids Trust Company, trustee in bankruptcy. From an order dismissing the petition, petitioners appeal. Affirmed.

Appeal from dismissal of intervening petition to vacate and set aside order adjudging Holland City Gas Company a bankrupt, and the bankruptcy proceeding itself. The city of Holland, a municipal corporation of Michigan, through ordinance approved March 10, 1903, granted permission to Bascom Parker and his assigns for a period of 30 years to lay and maintain gas pipes, mains, conduits and service pipes in the city streets and highways to supply manufactured gas for illuminating and fuel purposes both to the city and its inhabitants, at prices and subject to conditions therein provided. In September following, the rights thus granted were transferred to the Holland Gas Company, a Michigan corporation, and, in August 1905, to the Holland City Gas Company, another Michigan corporation; and the gas works and plant were thereafter, at least until commencement of the bankruptcy proceeding in question, maintained and operated and gas was supplied and sold in the name of appellee, the Holland City Gas Company.

However, on June 17, 1912, a corporation was organized under the name of American Public Utilities Company and pursuant to the laws of the state of Delaware, for purposes of production, distribution, and sale of artificial gas and electricity, and also the purchase of shares of stock in any corporation of "the state of Delaware, or of any other state, territory, or country." Later in that month this Delaware company purchased from the holders thereof a majority of the corporate shares in the Holland City Gas Company, and has purchased since then nearly all the rest of such shares, the total capital stock being $200,000 par value, divided into shares of $100 each, and prior to November, 1912, acquired from the various owners $160,500 par value of the gas company's outstanding first mortgage bonds, and since that time has purchased further bonds of the gas company, until the total holding is upwards of $298,000 par value, principally upon advances made by the Delaware company, some of them being on account of acquisition of what are known as the Zeeland properties for supplying gas in territory adjacent to the city of Holland. Through the shares of stock so obtained the Delaware company has ever since chosen and kept in place the directors, 5 in all, composing the board provided for the Holland City Gas Company, and these directors have from time to time selected from their number the officers of the company, viz. president, vice president, secretary, and treasurer.

In February, 1918, when the intervening petition was filed herein, the directors of the Holland City Gas Company were stockholders and directors of the Delaware company, though the latter company appears to have had 14 directors; the office of president of each company was held by the same person, and this is true of the positions of secretary and treasurer. The president of the two companies holds 1,932 shares of stock in the gas company in trust for the Delaware company, and the remaining directors of the gas company each hold one share of stock in that company.

The Delaware company owns and votes a large interest, doubtless a controlling interest, in the stock of various other corporations, viz. Albion Gas

& Light Company, at Albion, Mich.; Elkhart Gas & Fuel Company, at Elkhart, Merchants' Heat & Light Company, at Indianapolis, Valparaiso Lighting Company, at Valparaiso, all of Indiana; Wisconsin-Minnesota Light & Power Company, at La Crosse and other localities in Wisconsin and Minnesota; Jackson Light & Traction Company, at Jackson, Miss.; Utah Gas & Coke Company, at Salt Lake City; and Boise Gaslight & Coke Company at Boise, Idaho. The total assets of the Delaware company are valued at upwards of $12,845,000, admittedly comprising a "large percentage of the stock and of the bonds of the corporations" just mentioned.

A firm, Kelsey, Brewer & Co., composed of directors common to both the Holland City Gas Company and the Delaware company and claimed to be experienced in the operation and management of public utilities companies, is retained to give to all the companies above named the benefits of its experience.

On November 7, 1917, the Holland City Gas Company sent a communication to the mayor and council of the city, stating in substance that the operation of the gas properties at the prevailing prices could be continued only at an actual loss of money; that this was a fact under normal business and price conditions; that unless relief were provided at once it would be impossible under the present abnormal conditions to continue the operation of the plant; that from the 10th inst. the charge for gas in the city would be at the rate of $1.25 per thousand cubic feet, with a discount of 10 cents per thousand upon payment by the 15th of the month following that in which the gas would be consumed; that this price would "continue throughout the period affected by the duration of the war"; and that, should this increase fail to produce the necessary revenue to meet actual expenses, the company would be "compelled to close the plant and stop the supply of gas." This was 25 cents per thousand cubic feet in excess of the price then prevailing.

On December 1, 1917, the present appellants commenced suit against the gas company, and the Delaware company in the Ottawa circuit court, in chancery, setting up the facts touching the gas grant in question and its ultimate transfer to the Holland City Gas Company, alleging that this was the only source of gas supply for the inhabitants of the city; that there were upwards of 1,790 consumers dependent on gas for fuel, for cooking purposes, heat, and light; that in June, 1913, the gas company, its franchises and property, became the property of the Delaware company, which had ever since dominated the affairs and conducted the business of the gas company; that the price of gas was fixed by ordinance; that the Delaware company, through the gas company, sent the communication above pointed out to the mayor and council of the city; that such threatened increase in price was contrary to equity and good conscience, and would cause irreparable injury; and praying an order restraining defendants from exacting the threatened increase in price and also a mandatory injunction directing them to manufacture and supply gas to the city and its inhabitants in compliance with the provisions and rates of the ordinance. On December 3, 1917, an order was entered enjoining defendants from collecting a rate in excess of that fixed by the ordinance, and from closing the gas plant and stopping the supply of gas, until the further order of the court.

During the oral argument in the instant case we understood counsel to concur in the statement that the suit in the state court was commenced and the order of injunction granted without notice to the defendants in the case. It is to be inferred from one of the answers that nothing further was done in the case prior to the bankruptcy. The defendants filed separate answers, though it is not shown at what time. However, in the answer of the gas company, it is alleged that "since the time of the filing of the bill of complaint" it had "entered into voluntary bankruptcy" and had "been adjudged a bankrupt." The petition in bankruptcy was filed and the adjudication made February 1, 1918. It is stated in the opinion below that it was upon the voluntary petition of the Holland City Gas Company that the company was adjudged a bankrupt, and the parties stipulate that the petition as well as the adjudication was in the usual form. Appellants' intervention in the proceeding occurred later in the month, February 22d.

It is in effect alleged in the intervening petition, and admitted in the an-

swer herein, that, through either the receiver or the trustee in bankruptcy, gas is being supplied to meet the requirements of the inhabitants of the city of Holland. The answer alleges without denial that this is being done under a license from the city and at the rate of $1.25 per thousand cubic feet, which "was estimated to be the actual cost of production of the same without profit to the said trustee." Moreover, we understood at the oral argument that this was also sanctioned by an order of the court below, entered after hearing from both sides, and that the price was subject to the old discount of 10 cents per thousand cubic feet.

It is difficult to ascertain some of the relevant facts because of the omission to include in the record in addition to proofs of claims a further transcript of the bankruptcy proceedings (particularly a copy of the gas company's petition), and the dates of filing answers in the state court. The case was presented here upon the intervening petition, the joint answer of the bankrupt and trustee, certain exhibits, and a stipulation.

Charles H. McBride, of Holland, Mich., and Charles E. Ward, of Grand Rapids, Mich., for appellants.

Gerrit J. Diekema, of Holland, Mich., for appellees.

Before WARRINGTON and KNAPPEN, Circuit Judges, and KILLITS, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). Counsel urge the claims of appellants in the following order: (1) The Delaware company is bound to perform the gas contract; (2) the court below was without jurisdiction, since under the Bankruptcy Act the gas company has no right to become a bankrupt; (3) a public service corporation cannot under the amendment of 1910 become a voluntary bankrupt; (4) the gas company has no real existence apart from the Delaware company; (5) the case is a fraud upon the courts and the public.

[1] The second and third claims involve questions of law which may be passed for the present. The first and the last two claims concern the Delaware company's ownership of shares of stock and mortgage bonds of the gas company. The theory is that through such ownership the Delaware company has in effect supplanted the gas company, assumed its obligations, and become the owner of all its rights and property. The claimed basis of this is the use that is made by the majority stockholder of its power to select directors for the gas company, and also certain statements made by such stockholder, the Delaware company, to its own stockholders. Identity in directors, as well as certain officers, of the two companies, has been pointed out in the statement. In a prospectus of the Delaware company offering to underwriters preferred and common stock of its own issue, and in reports to its stockholders, information is given concerning, not only the company's own business affairs, but also those of the companies in which it holds capital stock and bonds. In distinguishing, for intance, its assets from those of the other companies, the company at times speaks in terms which at first sight create a wrong impression as to the actual relationship between the Delaware company and the companies in which it is interested. Use is made of such words and expressions as "control," "constituent companies," "subsidiary companies," "properties intrusted to its management," "your properties,"

"financing subsidiaries," and from these and the associated language appellants' counsel infer intent on the part of the Delaware company to assert absolute ownership in itself of franchises and property of the so-called constituent companies, and so counsel rely on such expressions as these to support an allegation of the intervening petition:

"That on, to wit, the 30th day of June, 1912, the Holland City Gas Company, its franchise, property, * * * became the property" of the Delaware company.

That was the time, as the statement points out, when the Delaware company made its first purchase of stock and bonds issued by the gas company. The prospectus and reports, however, when considered as an entirety, show that the terms in dispute were employed as convenient means for identifying and differentiating companies and objects, and not to describe precise corporate relationships. This is made clear by other and explicit statements. For example, it is stated in one of the reports:

"Control of this company (Holland City Gas Company) by American Utilities Company is maintained by the ownership of its capital stock."

The same language is used with the same object as respects all the other so-called subsidiary companies. These statements also explain a doubtful expression, found at the beginning of the same report, where it is said:

"With the organization of the American Public Utilities Company in 1912, there came into the possession of a single financing and directing organization a group of public service properties having peculiar advantages for economical supervision and operation."

This could not have meant, as counsel claim, that the Delaware company was thus asserting "ownership" of the "group of public service properties" mentioned, since, as we have seen, the company specifically stated in the same instrument that it controlled those companies through its ownership of capital stock therein. Again, in reporting its assets, the Delaware Company sets out its total holdings of "stocks of subsidiary companies," also of bonds, treasury stock, marketable securities, accounts receivable, cash, and the like, but of tangible property only "furniture and fixtures"; also a comparative statement expressly showing "gross earnings of subsidiary companies" for the years 1914, 1915, 1916, and 1917. Another example of the Delaware company's ambiguous statements is found in the report of December, 1917, to its own stockholders in relation to steps taken to secure an increase in rates for gas supplied in the city of Holland. It is there said:

"It has been the judgment of the officers of the company that this result is preferable to suffering further loss over the period of the franchise."

It is claimed for appellants that this allusion to officers means officers of the Delaware company; yet when the entire report is read, in connection with the report of the Holland City Gas Company to the mayor and council, mentioned in the statement, we think it plain that the term "officers of the company" meant the officers of the gas company.

[2] Whatever, then, may in other respects be said of the relations between the Delaware company and the gas company, we cannot think that the use of doubtful phrases, like those shown in the prospectus and reports just considered, warrants a conclusion that the stockholder, the Delaware company, had become the owner, as appellants allege, of the franchise and property standing in the name of the gas company, and it is not suggested that any formal transfer in this behalf has been made. It must be conceded, however, that through acquisition of shares of stock in the gas company, and through interrelations of the directorates and officers of the two companies, the Delaware company secured opportunity alike to benefit or to injure the interests of the gas company and its patrons. Courts will not hesitate to look into a situation like this and to grant merited relief. Corporate forms afford no protection where it is sought through such means to impose unlawful burdens or to commit fraud. Chicago, M. & St. P. Ry. v. Minn. Civic Ass'n, 247 U. S. 490, 501, 38 Sup. Ct. 553, 62 L. Ed. 1229. What, then, is to be deduced under the present record from the stock ownership of the Delaware company in the gas company and the official relations of the two companies?

[3] It is to be noticed that the Delaware company is not a party to this cause, and hence may not be bound by any conclusion reached here. Appellants insist, moreover, that it cannot be held in this case that the Delaware company is not bound to perform the gas contract, for the reason that the state court first obtained jurisdiction of that subject. We cannot, however, avoid passing on the status and condition of the gas company. Accordingly it is to be observed that there is no statute of the state of Michigan which forbids a corporation of another state, like the Delaware company, to purchase and hold shares in a Michigan corporation such as the gas company. It is distinctly shown that the Delaware company is possessed of power and authority to acquire and hold such shares; and what is said of shares of stock is also true of corporate bonds. In a word, no public policy prevailing in the state of Michigan is claimed to have been violated by the Delaware company's ownership of stock and bonds of the gas company. Further, it is not shown that the Delaware company, in its capacity as a stockholder or otherwise, has diverted or depleted, or in any wise impaired or damaged, the revenues, assets, or property of the gas company. The evidence, on the contrary, tends strongly to show that the Delaware company has through financial support materially aided and benefited the gas company. This obviously inured to the benefit of the City of Holland and its inhabitants, as patrons of the gas company; and yet it is not shown that the Delaware company has derived any profit from its ownership of stock in the gas company, or anything more than current interest on the bonds of that company.

Despite the interlocking scheme of directors and officers of the two companies, the case is devoid of evidence that these officials have through either acts or omissions prejudiced the interests of the gas company or interfered with its due discharge of corporate duty. We do not perceive, and it is not shown, how it could have been to the interest of the Delaware company or the directors or officers of the gas

company to inflict injury of any sort upon the rights or property of the gas company. Enough has already been said of the Delaware company's relations to the public service companies before named, including the Holland City Gas Company, to disclose a distinct purpose of the Delaware company to secure current and continuing income through its investments in these companies. Apart from such a purpose the Delaware company does not seem to have any reason to exist. No legitimate way of maintaining such a company is apparent, except through income derived from rightful earnings of the plants belonging to the other companies—in brief, the success of that company appears to depend upon the success of the others—since the interests of the Delaware company apparently reside, as here, in the capital stock of those companies.

Furthermore, it is to be observed that the Delaware company's holdings are not in naturally competing companies. The companies named in the present record are widely separated and operate in distinct municipalities, and the gas plant here in question is the only one in the city of Holland and is entirely within the state of Michigan. The case, therefore, does not fall within any principle opposed to the suppression of competition, as, for instance, the underlying principle of the Northern Securities Case, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, nor within any statutory inhibition against interlocking directorates similar to that of the Clayton act (Act Oct. 15, 1914, c. 323, 38 Stat. L. 732, § 8 [Comp. St. § 8835h]). It is to be added, in the language of the learned trial judge when speaking of the gas company:

"There has been no concealment of name or business operations. The local company has its own officers, its own office and books of account. It is the older company, and, so far as the public is concerned, there has been no change in the character of its business since its incorporation. It has at all times transacted business in its own name. It has complied with all state and municipal requirements. It has been dealt with and recognized by the state, the city of Holland, and its customers as a separate corporation."

Hence, under the facts of the instant case, we do not see why the status of the gas company should not be determined by the decisions cited and distinguished in Chicago, Minneapolis & St. Paul Ry. Co. v. Minn. Civic Ass'n, supra, 247 U. S. at page 500, 38 Sup. Ct. at page 557 (62 L. Ed. 1229) where Mr. Justice Clarke, speaking for the court, interpreted the rule of those decisions to be:

" * * * Ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two."

In addition to the ownership of stock involved in all of those cases, at least two, namely, Pullman Car Co. v. Missouri Pacific Co., 115 U. S. 587, 589, 596, 6 Sup. Ct. 194, 29 L. Ed. 499, and Peterson v. Chicago, Rock Island & Pac. Ry., 205 U. S. 364, 390, 27 Sup. Ct. 513, 51 L. Ed. 841, show that such ownership had in fact been used to create official relations between the stockholding companies and the com-

panies whose issues of stock were so held; and it may therefore be safely concluded that the foregoing interpretation was intended to embrace corporations also officially related, where, as here, the company whose stock is so held has been organized for legitimate purposes and separately maintained and employed in the rightful exercise and performance of its powers and duties. Such was the ruling principle applied by this court in what are called the Carpenter Cases, as respects the relations between the railroad company and the coal company and also the effort to hold the former upon the bonds of the latter. Wheeling & L. E. R. R. Co. v. Carpenter, 218 Fed. 273, 274, 276, 280, 134 C. C. A. 69; New York Trust Co. v. Carpenter, 250 Fed. 668, 674, 163 C. C. A. 14.

It results that the Chicago, M. & St. P. Ry. Case serves at once to distinguish the present controversy from the controlling principle of the decision in that case, and to render the decisions here relied on by appellants inapplicable. Clearly, then, the gas company was not supplanted by the Delaware company prior to the time the bankruptcy proceeding was instituted; and it cannot be that such a transition could have been effected by that proceeding. If we assume for the moment that a public service corporation is included within the true intent of the amendment of June, 1910 (36 Stat. p. 838, c. 412) to the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), and that the gas company was actually bankrupt, the right of that company to secure the benefit of the statute could not be impaired or defeated merely because the right was exercised through the control or at the instance of the Delaware company; for this mode of exercising the right was in no sense wrongful on the part of either company and so cannot be regarded as a fraud or imposition upon the city of Holland or any of the gas consumers. The jurisdiction of the federal court in bankruptcy was therefore properly invoked; under the bankruptcy law this jurisdiction was essentially exclusive, and the proceeding so instituted cannot in judicial contemplation be regarded as an undue interference with the suit begun in the state court. In re Yaryan Naval Stores Co., 214 Fed. 563, 565, 131 C. C. A. 15 (C. C. A. 6). After careful consideration we are convinced that Judge Sessions rightly concluded as matter of law that the gas company was entitled to become a voluntary bankrupt, and, apart from the remark that the company is a "private 'business' corporation," we approve the reasoning of the opinion. The facts upon which the gas company was adjudged a bankrupt must be accepted as sufficient to justify the order of adjudication. In view of some of the claims urged we deem it proper to set out substantially all the opinion below. The order dismissing the intervening petition will be affirmed.

SESSIONS, District Judge. Upon its voluntary petition, the Holland City Gas Company has been adjudged a bankrupt by this court. The city of Holland and a customer of the bankrupt, who has been and is a consumer and user of gas produced at its plant, have filed their petition to set aside the adjudication and to dismiss the bankruptcy proceedings. The grounds of the application as set forth in the present petition, are in substance:

(1) That a public service corporation like the bankrupt is not entitled to claim or obtain the benefits of the Bankruptcy Act;

(2) That the Holland City Gas Company has ceased to exist as a separate and distinct corporation, and has become and is merely an instrumentality, agent, or department of the American Public Utilities Company, a Delaware corporation; and

(3) That the adjudication was fraudulently procured.

1. In the case of Gibbs v. Baltimore Gas Co., 130 U. S. 396, 408, 410, 411, 9 Sup. Ct. 553, 557, 558 (32 L. Ed. 979) the Supreme Court said: "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. * * * It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests. * * * At common law corporations formed merely for the pecuniary benefit of their shareholders could, by a vote of the majority thereof part with their property and wind up their business, but corporations to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule."

The case above cited illustrates and exemplifies the strongest and best argument that can be urged against permitting a public service corporation voluntarily to do any act which must result in disabling it from performing its public duties. In the absence of statutory direction and mandate, such argument would be, not only persuasive, but controlling. But implied limitations, even though based upon grounds of public policy or necessity, must yield to positive and express legislative enactment. Congress has spoken in no uncertain terms upon the subject of the right of all corporations, with certain specified exceptions, to become voluntary bankrupts. Section 4a of the Bankruptcy Act provides that "any person, except a municipal, railroad, insurance or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." Comp. St. § 9588. This language is plain and unambiguous and can have but one meaning. The Holland City Gas Company is a "person" (section 1a19 [Comp. St. § 9585]), and is not a municipal, railroad, insurance, or banking corporation; hence it is entitled to become a voluntary bankrupt. Collier on Bankruptcy, p. 142.

With laborious effort counsel have built an argument upon the provisions of section 4b of the Bankruptcy Act relating to involuntary bankrupts. Of course, such an argument can have no application to a proceeding in voluntary bankruptcy like the present one; but, if it could, the result would be the same. It is true that in some cases arising prior to the amendment of this section in 1910, the courts, by a process of reasoning not entirely clear or satisfactory, reached the conclusion that public service corporations could not be adjudged involuntary bankrupts. In re Hudson River Electric Power Co. (D. C.) 173 Fed. 934; Id., 183 Fed. 701, 106 C. C. A. 139, 33 L. R. A. (N. S.) 454; In re Bay City Irrigation Co. (D. C.) 135 Fed. 850. In one case (In re Wilkes Barre Light Co. [D. C.] 224 Fed. 248) arising subsequent to the amendment of 1910 a District Court reached the same conclusion. But a most cursory examination of the opinion in that case will show that the amendment was either overlooked or ignored. Whether the reasoning of these cases is sound or unsound is quite immaterial, because they have no application to the amended statute.

The amendatory act of 1910 effected radical changes in the law and made many corporations subject to involuntary adjudication which could not have been proceeded against under the provisions of the original act. For example, it was held that hotel companies (Toxaway Hotel Co. v. Smathers, 216 U. S. 439, 30 Sup. Ct. 263, 54 L. Ed. 558; In re United States Hotel Co. [C. C. A. 6] 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588), water companies (In re N. Y. & W. Water Co. [D. C.] 98 Fed. 711), laundry companies (In re White Star Laundry Co. [D. C.] 117 Fed. 570; In re Eagle Steam Laundry Co. [D. C.] 178 Fed. 308), real estate companies (In re Kingston Realty Co., 160 Fed. 445, 87 C. C. A. 406), construction companies (Butt v. C. F. MacNichol Construction Co., 140 Fed. 840, 72 C. C. A. 252), warehouse companies (In re Pacific Coast Warehouse Co. [D. C.] 123 Fed. 749), and res-

taurant companies (In re Wentworth Lunch Co., 159 Fed. 413, 86 C. C. A. 393), were not subject to involuntary bankruptcy proceedings under the provisions of the Bankruptcy Act prior to the amendment of 1910. Since the amendment, which provides that "any moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation, * * * may be adjudged an involuntary bankrupt," the adjudication of such corporations has become so common as to be an everyday occurrence. There is no room for doubt that the Holland City Gas Company is a private "business" corporation.

Section 4b of the Bankruptcy Act now conforms closely to the corresponding provisions of the Act of March 2, 1867, c. 176, 14 Stat. 517, and it must be assumed that, in the substantial re-enactment of the earlier statute, Congress had in mind the interpretation and construction of that act by the courts while it was in force. It was then uniformly held that public service corporations were subject to adjudication as bankrupts and that no principle of public policy required "that the plain provisions of the statute should receive such a judicial construction as would exclude this class of corporations." Adams v. Boston H. & E. R. Co., 1 Fed. Cas. 90, Case No. 47; same case affirmed 23 Fed. Cas. 530, Case No. 13,684; Winter v. Iowa, M. & N. P. Co., 30 Fed. Cas. 329, Case No. 17,890; New Orleans R. R. Co. v. Delamore, 114 U. S. 501–506, 5 Sup. Ct. 1009, 29 L. Ed. 244.

2. The American Public Utilities Company owns or controls all of the stock and substantially all of the mortgage bonds of the Holland Gas Company. The stock was purchased from former stockholders. Part of the bonds were bought in the open market and the balance were issued for money advanced and loaned. The Utilities Company through its stock ownership controls the Gas Company in the same way and to the same extent that stockholders usually control corporations. * * * Under such circumstances, it cannot be said to have become merged in the other company or to have lost its corporate identity. As was said by the Circuit Court of Appeals of this circuit in Richmond & Irvine Construction Co. v. Richmond, N. I. & B. R. Co., 68 Fed. 105, 108, 15 C. C. A. 289, 292 (34 L. R. A. 625): "The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other through the ownership of its stock or through the identity of stockholders, operate to make either the agent of the other, or to merge the two corporations into one. There is no pretense of any fraudulent concealment of the interest of the one corporation in the other, or of the fact that the persons controlling the one corporation likewise controlled the other." See, also, Pittsburgh & Buffalo Co. v. Duncan (C. C. A. 6) 232 Fed. 584–587, 146 C. C. A. 542; Kardo Co. v. Adams (C. C. A. 6) 231 Fed. 950–964, 146 C. C. A. 146; Bigelow v. Calumet & Hecla Mining Co. (C. C. A. 6) 167 Fed. 721–728, 94 C. C. A. 13; In re Watertown Paper Co. (C. C. A. 2) 169 Fed. 252, 255, 256, 94 C. C. A. 528; C. Crane & Co. v. Fry (C. C. A. 4) 126 Fed. 278, 285, 61 C. C. A. 260.

3. The petition herein is replete with charges of concealment, deception and fraud. It is sufficient to say that the charges are not sustained by the proofs. Upon this record, the imputation of fraud rests largely, if not wholly, upon inferences sought to be drawn from the fact that, prior to the filing of the petition in bankruptcy, a suit was instituted in one of the state courts by these petitioners against the American Public Utilities Company and the Holland City Gas Company to restrain them from closing the bankrupt's gas plant and discontinuing its service and also from increasing rates as proposed and threatened. A temporary injunction was issued by the state court, but the case has not been tried upon the merits. No receiver has been asked for, and no attempt has been made to disturb or interfere with the possession and control of the plant or business. The sole purpose of the suit was to enforce what is claimed to be a contract obligation contained in the franchise granted by the city of Holland to a predecessor of the bankrupt. No creditor of the bankrupt, as such, is a party to the suit. The Gas Company insisted that it could not manufacture and furnish gas for the price fixed in and by its franchise and that it was suffering serious loss in the operation of its plant and threatened to discontinue its service unless it was permitted

to charge increased rates. Assuming that its threatened action would constitute a violation of its contract obligations, it is difficult to perceive how either the suit in the state court, the ultimate issues there involved, or the conduct of the bankrupt in applying to this court evidences such fraud as would bar an adjudication and prevent it from seeking or obtaining the benefits of the Bankruptcy Act. It is unnecessary to determine at this time the effect of the adjudication in bankruptcy upon the suit in the state court. Certainly it cannot affect any claims or rights which petitioners, or either of them, may have against the American Public Utilities Company.

The petition to vacate the adjudication will be denied.

(257 Fed. 689)

STETSON v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 13, 1919.)

No. 3217.

1. POISONS ⟹2—FEDERAL NARCOTIC DRUG ACT—VALIDITY OF ADMINISTRATIVE PROVISIONS.

   The administrative provisions of Harrison Narcotic Drug Act, § 1 (Comp. St. § 6287g), relating to taxation and registration, are valid.

2. INDICTMENT AND INFORMATION ⟹111(4)—FEDERAL NARCOTIC DRUG ACT—NEGATIVING EXCEPTIONS.

   An indictment for violation of the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), which described defendant as not being then and there an officer of the federal government or state government engaged in making purchases of the specified drug, and not being any other officer entitled to make such purchases, *held* not insufficient, as failing to negative all statutory exceptions from the operation of the statute by section 1.

3. INDICTMENT AND INFORMATION ⟹71—CERTAINTY.

   An indictment is sufficiently certain if it fairly informs accused of the crime intended to be charged, so as to enable him to prepare his defense, and so as to make the judgment a complete defense to a second prosecution.

4. INDICTMENT AND INFORMATION ⟹111(2)—FEDERAL NARCOTIC DRUG ACT—NEGATIVING EXCEPTIONS.

   Count of indictment for violation of the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.) *held* not bad, as not negativing the exception of section 6 (Comp. St. § 6287*l*), that the provisions of the act shall not be construed to apply to the dispensing of remedies not containing more than a quarter of a grain of morphine, etc.

5. INDICTMENT AND INFORMATION ⟹111(2)—NEGATIVING EXCEPTIONS.

   An exception in the enacting clause of a penal statute must be negatived by the indictment, but an exception in a later section need not be negatived.

6. INDICTMENT AND INFORMATION ⟹110(3)—DESCRIPTION OF STATUTORY OFFENSE.

   Description of a statutory offense in the language of the statute is sufficient, provided the language used according to its natural import fully describes the offense.

7. INDICTMENT AND INFORMATION ⟹110(3)—FEDERAL NARCOTIC DRUG ACT—DESCRIPTION OF OFFENSE—SUFFICIENCY—STATUTORY LANGUAGE.

   Indictment for violation of the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), stating the charge substantially, though not literally, in the language of section 1 of the act, fully defining the offense, and also alleging the sale of morphine in certain so-called morphine checks and other forms, *held* sufficient.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

8. POISONS ⟹4—FEDERAL NARCOTIC DRUG ACT—"PREPARATIONS AND REMEDIES."

"Preparations and remedies," contained in Harrison Narcotic Drug Act, § 6 (Comp. St. § 6287*l*), *held* not to include clear morphine, but to relate to actual medicinal preparations and remedies not containing more than a quarter of a grain of morphine, remedies such as a physician or druggist would normally dispense.

9. POISONS ⟹9—FEDERAL NARCOTIC DRUG ACT—EVIDENCE.

In a prosecution for violation of the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), defendant not being charged as a physician or a druggist, and the indictment not negativing the exception of section 6 of the act (Comp. St. § 6287*l*), it was open to him to show he was merely dispensing medicinal preparations and remedies containing not more than the amount of morphine permitted by section 6.

10. CRIMINAL LAW ⟹1186(4)—REVERSAL—TECHNICAL OBJECTION TO INDICTMENT.

Objection to indictment for violating the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), in that it did not negative the exception of section 6 (Comp. St. § 6287*l*) relative to the dispensing of preparations and remedies not containing more than a quarter of a grain of morphine, *held* technical, unsubstantial, and unprejudicial, and within the terms of Comp. St. § 1691. and Judicial Code, § 269 (Comp. St. § 1246), as amended February 26, 1919.

11. CRIMINAL LAW ⟹1144(17)—APPEAL—PRESUMPTION AS TO SENTENCE—IMPOSITION UNDER VALID COUNT.

In the absence of evidence to the contrary, sentence which could have been imposed on conviction under either count of an indictment will be presumed to have been imposed under the valid count.

12. POISONS ⟹4—HARRISON NARCOTIC DRUG ACT—APPLICATION OF SECTION.

Harrison Narcotic Drug Act, § 8 (Comp. St. § 6287n), applies to the business of selling narcotic drugs as distinct from mere possession.

13. CRIMINAL LAW ⟹1090(8, 11)—MATTERS NOT REVIEWABLE—ABSENCE OF BILL OF EXCEPTIONS.

On appeal from a conviction, cricitisms of alleged lack of evidence in certain respects, of asserted erroneous proceedings on trial, and of the introduction of certain undisputed evidence, cannot be considered, where the record contains no bill of exceptions, and thus no evidence.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Frank Stetson was convicted of violating the federal Narcotic Drug Act, and he brings error. Affirmed.

Frans E. Lindquist, of Kansas City, Mo., for plaintiff in error.

Frederic L. Eaton, Asst. U. S. Atty., of Detroit, Mich.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Stetson was indicted for violating the Harrison Narcotic Drug Act (U. S. Comp. St. 1916, § 6287g et seq.). The indictment contained two counts. The first charged him with engaging in carrying on the business of dealing in and selling morphine, by selling and dispensing the same to persons unknown, without having registered with or paid the special tax to the collector of internal revenue, as required by section 1 of the act. The second count charged him with a violation of section 8, in having morphine in his possession

for purposes of sale without having registered or paid the special tax. Under his plea of not guilty he was tried, convicted, and sentenced. He challenges the constitutionality of both sections 1 and 8 of the act, and the sufficiency of each count in the indictment.

[1] 1. The recent decisions of the Supreme Court of the United States in United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, in which petition for rehearing has been denied, and Webb & Goldbaum v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497, foreclose the question of the constitutionality of section 1. While those decisions directly relate to section 2, it follows, from the sustaining of the act as a revenue measure, that the validity of the administrative provisions of section 1, relating to taxation and registration, is unassailable.

[2, 3] 2. Section 1 contains a proviso exempting from the requirements of registration and payment of tax "officers of the United States government who are lawfully engaged in making purchases of the above-named drugs for the various departments of the Army and Navy, the public health service, and for government hospitals and prisons, and officers of any state government, or of any county or municipality therein, who are lawfully engaged in making purchases of the above-named drugs for state, county, or municipal hospitals or prisons, and officials of any territory or insular possession, or the District of Columbia, or of the United States, who are lawfully engaged in making purchases of the above-named drugs for hospitals or prisons therein."

Stetson is described in the indictment as "not being then and there an officer of the federal government or state government engaged in making purchases of the above-named drug, and not being then and there any other officer entitled to make purchases of said narcotic drugs." The indictment is criticized as failing to negative all the statutory exceptions. We think this criticism without merit. The statute does not except all officers of counties or municipalities, nor all officials of any territory or insular possessions, but only such as are lawfully engaged in making purchases of the drugs in question for hospitals and prisons. We think the negative contained in the indictment, while more general, is even broader than the statute. Defendant cannot complain that the exception is made to cover more than it need to. It does not affect his substantial rights, nor tend to his prejudice. An indictment is sufficiently certain if it fairly inform the accused of the crime intended to be charged so as to enable him to prepare for his defense, and so as to make the judgment a complete defense to a second prosecution for the same offense. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Tyomies Pub. Co. v. United States (C. C. A. 6) 211 Fed. 385, 389, 128 C. C. A. 47; Daniels v. United States (C. C. A. 6) 196 Fed. 459, 465, 116 C. C. A. 233.

In our opinion, the indictment, so far as the question we are considering is concerned, responds to this test.

[4-7] 3. Section 6 of the Harrison Act (Comp. St. § 6287*l*) declares that its provisions "shall not be construed to apply to the sale, distribution, giving away, dispensing, or possession of preparations and rem-

edies which do not contain more than * * * one-fourth of a grain of morphine; * * * Provided that such remedies are sold, distributed, given away, dispensed, or possessed as medicines, and not for the purpose of evading the intentions and provisions of this act."

The criticism that the first count of the indictment is bad, because not negativing this exception, does not impress us as meritorious. The general rule is that an exception in the enacting clause must be negatived by the pleader, but that an exception in a later section of the statute need not be negatived. United States v. Cook, 17 Wall. 168, 21 L. Ed. 538; Ledbetter v. United States, 170 U. S. 606, 611, 18 Sup. Ct. 774, 42 L. Ed. 1162; Shelp v. United States (C. C. A. 9) 81 Fed. 694, 696, 26 C. C. A. 570; Breitmayer v. United States (C. C. A. 6) 249 Fed. 929, 934, 162 C. C. A. 127.

In United States v. Cook, supra, it is said, somewhat obiter (17 Wall. 176, 21 L. Ed. 538), that although the exception is not in the enacting clause, yet if it is so incorporated with that clause "that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in a succeeding sentence." It is also the rule that a description of a statutory offense in the language of the statute is sufficient, provided the language used, according to its natural import, fully describes the offense. Potter v. United States, 155 U. S. 438, 444, 15 Sup. Ct. 144, 39 L. Ed. 214. In our opinion the first section of the act fully defines the substantive offense with which defendant is charged. That section makes it unlawful for any person required to register under the act to deal in, sell or dispense morphine without registering and paying the tax. The indictment states the charge substantially, although not literally, in the language of the section. Moreover, it alleges the sale of morphine "in certain so-called morphine checks and other forms."

[8-10] Defendant pleaded to the indictment without questioning its sufficiency. We think that the words "preparations and remedies" contained in section 6 are not meant to include clear morphine, but relate to actual medicinal "preparations and remedies which do not contain more than * * * one-quarter of a grain of morphine"—such preparations and remedies as a druggist or a physician would normally dispense. In view of the fact that defendant is not charged as a physician or a druggist, we think he was sufficiently informed of the accusation, and that under that accusation it was open to him to show that he was merely dispensing medicinal "preparations and remedies," containing not more than the permitted amount of morphine. We think this conclusion finds more or less support in Shelp v. United States, supra, where, in an indictment for selling liquor contrary to the act forbidding the "importation, manufacture, and sale of intoxicating liquors" in Alaska, "except for medicinal, mechanical and scientific purposes," it was held not necessary to negative the exception mentioned in the statute; also Ledbetter v. United States, supra, where it was held sufficient to charge the offense in the language of the stat-

ute and unnecessary to negative the exception "other than as hereinafter provided," in the statute forbidding the carrying on of a liquor business. See also Smith v. United States (C. C. A. 8) 157 Fed. 721, 85 C. C. A. 353; Young v. United States (C. C. A. 6) 249 Fed. 935, 937, 162 C. C. A. 133. In view of the considerations stated, and of the further fact that whether he was within the subject-matter of the exception was peculiarly within defendant's own knowledge, we think the criticism we are considering is technical, unsubstantial and unprejudicial, and thus within the terms of section 1691 of the Compiled Statutes and section 269 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. § 1246]), as amended February 26, 1919 (40 Stat. 1181, c. 48).

[11, 12] 4. The conclusion reached as to the sufficiency of the first count makes consideration of the second count unnecessary. The conviction was a general one, and covered both counts. The sentence was such as could have been imposed upon a conviction under either count. In the absence of evidence to the contrary, it will be presumed to have been imposed under the valid count. Claasen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Hardesty v. United States (C. C. A. 6) 168 Fed. 25, 26, 93 C. C. A. 417, and cases cited; Bartholomew v. United States (C. C. A. 6) 177 Fed. at p. 905, 101 C. C. A. 182; Botsford v. United States (C. C. A. 6) 215 Fed. 510, 132 C. C. A. 22. In thus passing by the second count, we must not be understood as questioning its sufficiency or the validity of section 8 of the act. That section applies to the business of selling, as distinguished from mere possession. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854.

[13] 5. The criticisms of alleged lack of evidence in certain respects, of asserted erroneous proceedings on the trial, and of the introduction of certain undisputed evidence, cannot be considered. The record contains no bill of exceptions, and thus no evidence. So far as concerns the proceedings below, it is confined to the indictment, the plea, the verdict, the sentence, and motion that a proposed bill of exceptions be signed, and the order denying that motion. Before the writ of error was returned to this court we denied an application for mandamus to compel settlement of bill of exceptions, for the reason that it affirmatively appeared that the court below had lost jurisdiction so to do by the lapse of the term at which the judgment was entered, without reservation of jurisdiction over the settlement, and without attempt on the part of defendant to have such jurisdiction reserved.

Finding no reversible error in the record, the judgment of the District Court is affirmed.

(257 Fed. 694)

FEDER et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 205.

1. CRIMINAL LAW ⟹424(1)—EVIDENCE—STATEMENTS BY ONE DEFENDANT AFTER FAILURE OF CONSPIRACY.

In a prosecution of two defendants for conspiracy to defraud the United States, testimony of statements or admissions by one defendant, made to a representative of the Department of Justice after the conspiracy, if it had existed, had ended in failure, *held* inadmissible against the other defendant.

2. CRIMINAL LAW ⟹673(4)—FAILURE TO LIMIT EVIDENCE—CODEFENDANTS.

In a prosecution for conspiracy to defraud the United States, where testimony was admitted of the statements or admissions of one defendant, made to a representative of the Department of Justice after the conspiracy had ended in failure, it was prejudicial error to refuse to instruct that such statements, made out of court, were not competent as against the other defendant.

3. CONSPIRACY ⟹48—CONVICTION OF ONE DEFENDANT AFTER DEATH OF OTHER—EFFECT OF ACQUITTAL OR NOLLE PROSEQUI.

Though the union of the minds of at least two persons is a prerequisite to the commission of the crime of conspiracy, yet one may be convicted after the other accused is dead before conviction; but, if one be acquitted, the other also must be acquitted, as is the case if the prosecutor enter a nolle prosequi as to one.

4. CRIMINAL LAW ⟹1186(1)—REVERSAL—IMPROPER CONVICTION OF ONE OF TWO COCONSPIRATORS—EFFECT ON CONVICTION OF OTHER.

In a prosecution of two defendants for conspiracy to defraud the United States, where on his writ of error there must be a reversal of the conviction of one defendant for the improper admission of evidence against him, there must also be a reversal of the conviction of the other.

In Error to the District Court of the United States for the Eastern District of New York.

Isabelle Feder and Michael Polsky were convicted of conspiring to defraud the United States, and they bring error. Judgments reversed, and new trials ordered.

Robert H. Elder, of New York City (Otho S. Bowling, of New York City, of counsel), for plaintiff in error Polsky.

Max D. Steuer, of New York City (Theodore Megaarden, of New York City, of counsel), for plaintiff in error Feder.

Melville J. Franee, U. S. Atty., of New York City, and James D. Bell, U. S. Atty., of Brooklyn, N. Y. (Charles J. Buchner, Sp. Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. Although plaintiffs in error were brought to trial under two indictments, they were convicted and sentenced under one only.

They were in common form accused of conspiring to defraud the United States by procuring, or endeavoring to procure, the acceptance by the War Department of, and payment by the United States for, a

large number of "barrack bags" which were improperly made, defective, and "useless to the United States for the purpose for which they were manufactured." The overt act relied upon and pleaded consisted in giving to certain representatives of the War Department of the United States money for the purpose of corrupting them and so procuring the acceptance of the aforesaid defective articles of manufacture. Criminal Code (Act March 4, 1909, c. 321) §§ 37, 39, 35 Stat. 1096 (Comp. St. §§ 10201, 10203). The defendants were convicted and took out several writs of error.

The record shows that ample evidence was offered by the prosecution tending to show that defendant Feder formed and endeavored to carry out the plan of corruptly influencing those representatives of the United States whose business it was to see that the barrack bags in question were good bags, and thus to procure their acceptance, although they did not comply with the specifications under which they were manufactured. But as the indictment was for conspiracy the crucial question was whether the two defendants had corruptly agreed to endeavor to bring about this result—no matter what may have been the purposes of the defendant Feder.

The indictment charges these two defendants only; it contains no allegation that they were but part of a larger body of conspirators, nor the usual averment that they conspired and agreed not only with themselves, but with "other persons to the grand jury unknown." Neither is there any evidence that any person or persons were engaged or concerned in or about said conspiracy except Feder and Polsky.

[1, 2] In order to sustain this accusation the prosecutor demanded of defendant Feder (who took the witness stand) whether or not she had made certain admissions or volunteered certain statements to a representative of the United States, which admissions or declarations, if made, strongly tended to prove the existence of the conspiracy. Defendant Feder denied having made some of the suggested and material statements, admissions or declarations, whereupon the prosecution produced a stenographic transcript of the conversations at which the statements in question had been made, and the same was admitted in evidence against both defendants.

The person to whom these statements or admissions had been made was a representative of the Department of Justice, and it is beyond all question from the record that at the time Feder was produced before said representative the conspiracy (assuming that it existed) had ended, and ended in failure. Thereupon counsel for Polsky (who did not testify) requested the court to instruct the jury that—

> "None of these statements * * * made by the defendant Feder * * * is any evidence against the defendant Polsky, and they must not consider such statements or any part of them as being evidence against Polsky."

This request the court denied. At the close of the evidence and after the court's colloquial charge, counsel for Polsky again requested the court to charge the jury that—

> "In determining the question of Polsky's guilt the jury cannot consider as evidence against him any statement or statements which tended to implicate him and were made by the defendant Feder as set forth in the stenographic record."

And this request the court refused.

It is true that the established rule of Logan v. United States, 144 U. S. 309, 12 Sup. Ct. 617, 36 L. Ed. 429 (recently reiterated by this court in Erber v. United States, 234 Fed. 228, 148 C. C. A. 123), was not specifically brought to the attention of the trial judge when these requests were proffered. But that rule, to the effect that only those acts and declarations of a coconspirator are admissible against his fellows "which are done and made while the conspiracy is pending and in furtherance of its object," was plainly violated in a way as plainly prejudicial to Polsky. This conspiracy had come to an end, and when that occurred, "whether by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others."

Since defendant Feder was proffered as a witness, whatever was extracted from her on the witness stand was competent, relevant, and material against her; but the refusal to charge that the said statements made out of court were not competent as against Polsky was prejudicial error.

[3] The question remaining is: What disposition must be made of these writs under the circumstances shown? If defendant Feder had been tried alone, the record would have exhibited no error. Although the union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy, yet one may be convicted after the other accused is dead before conviction. Per Kent, J., People v. Olcott, 2 Johns. Cas. (N. Y.) at 310, 1 Am. Dec. 168. Yet not only if one of two conspirators be acquitted must the other also be acquitted, but, even if the prosecutor enter a nolle prosequi as to one, the other must be acquitted. State v. Jackson, 7 S. C. 283, 24 Am. Rep. 476; Commonwealth v. Edwards, 135 Pa. 474, 19 Atl. 1064. And even where evidence tended to show that three defendants had conspired, and the jury declared that A. had conspired with one of the other two, but they could not tell which one, it was held by Lord Campbell, C. J.:

> "I think under these circumstances the verdict against A. cannot be supported. It is conceded that, if there be an indictment against two persons for a conspiracy, the acquittal of one must invalidate the conviction of the other. I cannot draw a distinction between the cases of two or three persons, if one only is found guilty. If three are indicted and two found not guilty the third must also be acquitted." Reg. v. Thompson, 16 Q. B. 832.

The rule as to convictions in conspiracy may be summed up by saying that, provided the acquittal or death of coconspirators does not remove the basis of the charge, one defendant may be convicted of the offense. Cf. People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; People v. Richards, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716, and cases supra.

[4] In the cause at bar Polsky is plainly entitled to a new trial, but unless he is guilty there can be no conspiracy. The basis of the charge is swept away if in point of fact there was no union of minds between Polsky and Feder, no matter what Feder's intent, purpose or effort may have been. While even in conspiracy a new trial has been granted to one of numerous defendants without disturbing the verdict

against others (Rex v. Mawbey, 6 T. R. 619), the rule was formerly general that, if a new trial be given to one after a conviction for conspiracy, it is given to all who were found guilty. In Reg. v. Gumpertz et al., 9 Q. B. 482, Denman, C. J., said:

"We cannot grant a new trial to one conspirator without granting it to all who are convicted; as we cannot separate the defendants, there must be a new trial as to all."

This remark must be taken with the limitation above indicated, and indeed commented upon by Lord Denman's colleagues by referring to Rex v. Mawbey, supra. The rule is founded upon much reason, as was remarked in Commonwealth v. McGowan, 2 Pars. Eq. Cas. (Pa.) 341, a case which followed the Gumpertz decision, soon after the latter was rendered. It has been accepted by writers of authority. Vide Wharton's Criminal Law (10th Ed.) § 1395; Bishop's New Criminal Procedure (4th Ed.) § 1038.

The reason for the rule is in our opinion the indivisibility of the crime for which a plurality of defendants are tried. This perhaps is best illustrated by the application of it made in Dutcher v. State, 16 Neb. 30, 19 N. W. 612, where, because of error in respect of one of several defendants accused of tumultuous and unlawful assembling, a new trial was granted to all.

The matter has received some consideration in this court. United States v. Cohn (C. C.) 128 Fed. 615, was an indictment for conspiracy against three men in respect of an agreement to defraud the United States made by them and "others to the jurors unknown." Two only of the defendants were brought to trial. The trial judge gave a new trial to one of them and denied it as to the other, who thereupon took a writ of error, reported as Browne v. United States, 145 Fed. 1, 76 C. C. A. 31 (certiorari refused 200 U. S. 618, 26 Sup. Ct. 755, 50 L. Ed. 623). This point is considered at page 13, and holds in substance that the jury might well have convicted the one person ultimately held guilty for conspiring, not with the defendant to whom a new trial was awarded but with the absent defendant named, and the "persons to the jurors unknown."

But where, as here, it is impossible that Feder should be guilty unless Polsky is, the crime is in every sense indivisible, its essence is the mental confederation not of any two of numerous persons (some perhaps to the "grand jury unknown"), but of these two particular defendants, Feder and Polsky. We (in Lord Denman's phrase) "cannot separate" these defendants; for the conspiracy is already reduced to its very lowest terms, viz. two persons. Therefore the rule still applies.

Judgments reversed, and new trials ordered.

(257 Fed. 698)

FINNIE v. WALKER et al.

(Circuit Court of Appeals, Second Circuit. April 22, 1919.)

No. 180.

1. INSURANCE ⟹122—ASSIGNMENT OF LIFE POLICY—VALIDITY—WAGERING CONTRACT.

The assignment of a life insurance policy, in effect contemporaneously with its issuance or later, with wagering intent, to one having no insurable interest as relative, dependent, or creditor, is invalid but does not invalidate the policy and the proceeds received by the assignee are recoverable for the benefit of the estate of the insured, less such sums as the assignee may have paid out thereon.

2. INSURANCE ⟹648(1)—SUIT AGAINST ASSIGNEE—EVIDENCE.

Evidence that an insured was in poor health at the time of the assignment of the policy, and of knowledge of such fact by the assignee, is competent on the question whether the assignment was with wagering intent.

Ward, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Nelle E. Finnie, administratrix of the estate of David T. Finnie, deceased, against Alfred P. Walker and George K. Morrow. Decree for defendants, and complainant appeals. Reversed.

Rollins & Rollins, of New York City (E. A. Merrill, of Westfield, N. J., on the brief), for appellant.

Owen N. Brown, of New York City (Conover English, of Newark, N. J., of counsel), for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The Equitable Life Assurance Society, in August, 1912, issued five policies of life insurance in the principal sum of $5,000, upon the life of David T. Finnie. These policies were all delivered to A. S. Herenden, general agent of the society, and remained in his possession until their delivery by him.

[1] Policy No. 1,778,976, payable to Finnie's wife, with right of revocation, was assigned September 26, 1913, to Morrow. Finnie paid the first premium to the agent of the company. Policy No. 1,778,977, payable to the estate of Finnie, was assigned August 22, 1912, to the appellee Morrow. Policy No. 1,778,978, payable to the estate of Finnie, was assigned August 20, 1912, to Morrow. Policy No. 1,779,245, payable to the estate of Finnie, was assigned September 12, 1912, to Morrow. Policy No. 1,779,241, payable to the estate of Finnie, was assigned August 22, 1912, to the appellee Walker, and on September 16, 1913, Walker assigned the policy to Morrow. The premiums on four of these policies were paid by Morrow, and on the fifth by Walker's note, but Morrow paid the note.

Finnie died September 18, 1917, and the moneys due on the five policies were paid to Morrow on September 20, 1917. The administratrix of the estate now sues in equity to recover the proceeds paid to Morrow, and praying that the appellees be allowed their respective

sums paid for premiums, with interest, and that the difference be paid to the estate she represents. The theory of the action is that each assignee had no insurable interest in the life of Finnie and that the assignments were in law wagering contracts. The trial judge dismissed the bill.

If Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924, has not been overruled or is not inconsistent with what was held in the later case of the Supreme Court, Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863, the appellant is entitled to the relief she seeks. In the Warnock Case, supra, the plaintiff's intestate, on procuring insurance upon his life, entered into an agreement with a firm whereby it was to pay all fees and assessments payable to the underwriters on the policy and to receive nine-tenths due thereon at his death. Pursuant to this agreement, the intestate executed an assignment of the policy and the firm paid the fees and assessments. Upon his death, the firm collected from the underwriters nine-tenths of the amount due on the policy, plus the premiums paid. The administrator sued the underwriters for this nine-tenths. There was no claim or charge of fraud upon the part of any one. In approving a recovery, the court said, speaking of insurable interest:

"But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefore, independently of any statute on the subject, condemned, as being against public policy.

"*The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion, merely, of the insurance money.* To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money. * * *

"It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will therefore hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was also lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned."

In an earlier case, Cammack v. Lewis, 15 Wall. 643, 21 L. Ed. 244, the policy of insurance for $3,000 was procured by the debtor at the suggestion of a creditor to whom he owed $70. It was assigned to the creditor to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one-third of the proceeds was to go

to his widow. On his death, the assignee collected the money from the insurance company and paid the widow $950 as her proportion, after deducting certain payments made. The widow, as administratrix of the deceased's estate, sued for the balance of the money collected and was successful. It was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering operation, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, for such advances as he might have afterwards made on account of it, and that the assignment was valid only to that extent.

In the case relied upon by the appellees (Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. [N. S.] 642, Ann. Cas. 1913B, 863) it, at best, limited the doctrine of Warnock v. Davis, supra, so as to permit a policy previously taken out, under circumstances which made it perfectly valid, to be assigned to one who had no insurable interest in the life of the insured, providing a valid consideration was paid therefor by the assignee. A life insurance policy taken out in good faith by the insured, with no idea of assigning it, can afterwards, in good faith, and for a valuable consideration, be sold and assigned to one who has no insurable interest in the life, under this latter case. In considering the authorities, Justice Holmes said:

> "And cases in which a person having an interest lends himself to one without any as a cloak to what is in its inception a wager having no similarity to those where an honest contract is sold in good faith. * * * But the case in which the strongest of them occurs was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. Warnock v. Davis, 104 U. S. 775 [26 L. Ed. 924]."

In the Grigsby Case, supra, the insured, after paying two premiums and when the third was overdue, was in need of a surgical operation, obtained it from a doctor, and prevailed upon the doctor to buy the policy, for which the doctor paid $100. This was held to be a valid assignment. It will be noted, however, that this was an out-and-out assignment, and there was no agreement, as in the Warnock or Cammack Cases, for a part interest only in the insurance; in other words, there were no conditions imposed which limited the extent of the assignment.

These policies were issued to the estate of the intestate and the salutary rule of public policy which condemns wagering assignments, forbids the appellees retaining the moneys they received, other than the premiums paid by them. Contemporaneous assignments of life insurance policies are wagering contracts, and should be treated as such, just as the policies are where the beneficiary has no insurable interest. Here the policy was taken out with a view of its assignment. The assignment was contemporaneous with the issuance of the policy, and the facts disclosed in this record permit a fair inference that it was the intent of the appellees to obtain just such a result as the issuance of a wagering contract of insurance permits.

Justice Holmes, in Grigsby v. Russell, supra, indicates a desire on the part of the court to give as much commercial freedom and value as possible to the owner of a life insurance policy which has a market value; but that decision cannot be extended to cover facts such as are presented here, where there are four assignments of policies, with no consideration moving to the insured, and no consideration of commercial advantage is urged to sustain the assignments. As we read the opinion of the court, it is at least intimated that the court would follow the Warnock Case under similar circumstances, and it therefore follows that this court should visit its condemnation upon the assignments in the case now under consideration in this court.

It seems to us the facts require a conclusive presumption of wagering intent as to the fifth (that is, policy No. 1,778,976), assigned to Morrow in September, 1913. Even though this assignment be remote, in point of time, from the other contemporaneous assignments, and therefore not subject to the condemnation by reason thereof, it will be held illegal and void beyond the sums advanced. This presumption was kept alive because of the inference in law arising from the wagering intent, established by the fact that Morrow knew, at the time of this assignment, that Finnie was a very sick man, and that the amount of the contract, compared with what was paid, permitted playing for a large stake. There was an intimate and close business connection between this transaction and the previous ones, wherein Morrow was gradually accumulating the five policies upon the life of the deceased. If, from these facts, the wagering intent may be presumed, as it must, that avoids the assignment. Any contract, the tendency of which is to endanger the public interest and affect the public good, and which is subversive of sound morality, ought never to receive the sanction of a court of equity or be the foundation for its judgment. Ritter v. Mutual Life Ins. Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

In endeavoring to do equity between the two parties, the appellees will have full equity administered to them by obtaining the premiums and interest and other charges which they may have invested in keeping alive these policies. Relief should not be denied the appellant because the appellees have been paid by the insurance company. They may not keep the moneys which, through error of law or fact, or both, have been paid to them by the insurance company. Because of the mistake of the insurance company, they should not have what the law says is not their property. The right to make them account as trustees for the moneys paid them by the insurance company cannot be denied the appellant. This would be contrary to Warnock v. Davis, as demonstrated by the language of the court above quoted. The assignment of a policy to a party not having an insurable interest, with wagering intent, is as objectionable as the taking out of a policy in his name. The court can do no other than declare the assignment void; but it does not follow that the policy, which was issued and under which the money was paid, is void. Where the courts have held the assignments void and unenforceable, nevertheless the policy is valid, and the assignee may retain the antecedent debt or other consideration and advances made to keep the policy alive.

The theory of such a result seems to be that the assignment is said to be good as a designation of an appointee to receive payment from the insurance company and as a security for advancements. The illegality is in the attempt of the assignee to retain the entire proceeds. Stevens v. Warren, 101 Mass. 564; Page v. Burnstine, 102 U. S. 644, 26 L. Ed. 268; Warnock v. Davis, supra. Certainly, if the assignment is held to be invalid, the administratrix may recover by virtue of her original title to the policy, for the reason that it never went out of the assignor or vested in the assignee. One who seeks equity must do equity, and therefore the administratrix here must permit the appellees to retain, out of the proceeds of the policy, the consideration and other charges paid.

[2] Since there must be a new trial, we must consider the appellant's fourth assignment of error. The District Judge in his opinion, stated that the case presented a legal point of great importance, new in this jurisdiction, and he treated it as a law point, stating that if he was wrong there must be a new trial, because of the rejection of evidence offered by the appellant which would be of importance under the theory of law announced in this opinion. The appellant offered evidence as to Finnie's bad health and knowledge thereof by assignee. Condition of health of the insured at the time of the assignment of his life insurance policy was competent and important in determining the question of wagering intent. It was therefore error to exclude this testimony.

Judgment reversed.

WARD, Circuit Judge (dissenting). The theory of the bill is that the assignees of the policies had no insurable interest to sustain absolute assignments, and that they should be construed only to secure any advances made to Finnie in his lifetime; the balance of the insurance collected by the defendant Morrow from the insurance company to be paid to Finnie's estate.

The defendants in their demurrers denied that they had advanced any moneys to Finnie in his lifetime, or that they held the policies as collateral security. On the contrary, they claimed to be absolute owners as purchasers. It is true that the defendant Morrow testified on the trial that Finnie owed him some $400 to $500; but this was rightly rejected by the District Judge as having been a consideration for the assignments to him. The bill cannot be sustained on this theory. Neither of the defendants had any insurable interest in Finnie's life as relative, dependent, or creditor.

Policy 1,778,976, dated August 20, 1912 and executed by the company August 21st, was delivered to Finnie against his note for the first annual premium, which note he paid. Subsequently he revoked the designation of his wife as beneficiary, and assigned the policy to the defendant Morrow for an expressed consideration of $1. This being a valid policy on Finnie's life, it was his property, which he could sell or give to any one, without reference to insurable interest, as held in Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863.

The other four policies, though payable to his estate, were never delivered by the company to Finnie; he never paid any premiums upon them, and never owned them at all. They did not come into existence until delivery to his assignees against payment by them of the first annual premium. Finnie never had a valid policy to sell or give away, within the decision in the Grigsby Case. The situation was exactly as if the assignees had originally taken out wagering policies upon his life payable to them. Therefore I think, not merely the assignments, but the policies themselves, were void as wagering insurance. The fact that the insurance company has paid them to the defendant Morrow, assignee, as absolute owner, without raising any question of invalidity, does not change their character qua Finnie's estate.

But the court, relying upon Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924, holds that the assignments are void, but the policies valid. It must be admitted, as intimated by Mr. Justice Holmes in the Grigsby Case, that the language of Mr. Justice Field was too broad, although he finds the decisions themselves to be consistent with each other. I think they can be reconciled on the theory that in Warnock v. Davis the policy itself was held valid, perhaps because taken out by and delivered to the insured, he paying at least one-tenth of the first annual premium, and being liable for at least one-tenth of the subsequent premiums, and his widow, or, in case of her death, his estate, being entitled to at least one-tenth of the insurance.

This may have justified treating the assignment of the remaining nine-tenths as valid, but only as security for repayment of premiums advanced by the assignee. But the four policies in the instant case were in my opinion never valid at all, being pure wagers from their inception, and therefore neither Finnie in his lifetime nor his estate after his death had any standing to make claims against the insurance company or the person to whom it has paid the insurance. I think the decree should be affirmed as to the first policy, because it was valid, and as to the four policies, because Finnie's estate has no interest in them, and not because they are valid.

(257 Fed. 703)

BROWN v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3224.

1. ARMY AND NAVY ⟹20—SELECTIVE SERVICE ACT—VIOLATIONS—INFORMATION.

An information charging a violation of the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k), in that defendant willfully failed and refused to present himself for registration on June 5, 1917, is not fatally defective for want of an allegation that defendant is a citizen of the United States.

2. DISTRICT AND PROSECUTING ATTORNEYS ⟹3(4)—INDICTMENT AND INFORMATION ⟹52(3)—VERIFICATION BY ASSISTANT DISTRICT ATTORNEY.

Under Rev. St. § 363 (Comp. St. § 538), giving the attorney general power to employ, in the name of the United States, attorneys to assist the dis-

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied October 14, 1919.

trict attorney in the discharge of his duties, an information is not open to attack because verified by an assistant United States district attorney, for such assistants come within the general rule that an assistant duly appointed to prosecute is clothed with all of the powers and privileges of the prosecuting attorney.

3. INDICTMENT AND INFORMATION ⟹ 52(4)—VERIFICATION—INFORMATION AND BELIEF.

It is only where it is sought to issue a warrant that the Constitution requires that the affidavit must be by one knowing the facts; therefore, as there is no statute requiring the verification of an information, an information is not open to attack because verified on information and belief.

4. ARMY AND NAVY ⟹20—SELECTIVE SERVICE ACT.

In a prosecution under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k) for failure to present himself for registration on June 5, 1917, evidence *held* not to show that defendant was entitled to the direction of a verdict in his favor, on the ground that he was not bound to register under Selective Service Regulations, § 56, pt. 3, declaring that citizens and persons who have declared their intention to become citizens, residing abroad, are not required to register.

5. ARMY AND NAVY ⟹20—SELECTIVE SERVICE ACT—FAILURE TO REGISTER—EVIDENCE.

An opinion by the local legal advisory board to the effect that defendant was not required to register is no defense to a prosecution for failure to register on June 5, 1917, as required by the Selective Service Law (Comp. St. 1918, §§ 2044a–2044k); the advisory boards not being created until November of that year, when the Selective Service Regulations were promulgated.

6. ARMY AND NAVY ⟹20—SELECTIVE SERVICE ACT—FAILURE TO REGISTER—EVIDENCE.

In a prosecution under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k) for failure to register on June 5, 1917, vouchers given to defendant in February, 1917, which on their face indicated that he was at that time acting as deputy sheriff for Lincoln county, Mont., *held* admissible in evidence; defendant's contention being that he was then a resident of Canada.

7. CRIMINAL LAW ⟹1054(1)—APPEAL—EXCEPTIONS—EVIDENCE.

Rulings on evidence, not presented by an exception, cannot be considered on appeal.

In Error to the District Court of the United States, for the District of Montana; George M. Bourquin, Judge.

Howard Brown was convicted of failure and refusal to register on June 5, 1917, as required by the Selective Service Law, and brings error. Affirmed.

J. M. Blackford, of Libby, Mont., and R. P. Henshall, of San Francisco, Cal., for plaintiff in error.

E. C. Day, U. S. Atty., of Helena, Mont., Burton K. Wheeler, U. S. Atty., and James H. Baldwin, Asst. U. S. Atty., both of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted upon an information which charged him with willfully failing and refusing to present himself for registration on June 5, 1917, at the

registration place in the precinct of Lincoln county, Mont., in which he then and there had his permanent home and actual place of legal residence; he being a male person between the ages of 21 and 30 years, and not an officer or an enlisted man of the Regular Army or Navy, or Marine Corps, or in other service of the United States, or in the Reserve Corps, etc.

[1] It is assigned as error that the court admitted testimony on an information which failed to state facts sufficient to constitute a public offense. No objection to the introduction of evidence was suggested to the trial court, but it is now said that the information is fatally defective for want of an allegation that the plaintiff in error was a citizen of the United States. In Ruthenberg v. United States, 245 U. S. 480, 38 Sup. Ct. 168, 62 L. Ed. 414, the court held that it was not necessary to charge that the accused who refused to register was a citizen of the United States.

[2] The information was verified by an assistant United States district attorney, and on that ground it is urged that it was fatally defective. Section 363, Rev. Stats. (Comp. St. § 538), gives the Attorney General power to employ, in the name of the United States, attorneys "to assist the district attorneys in the discharge of their duties." It places no restriction upon the powers of the assistant district attorneys. They come within the general rule that an assistant, duly appointed to prosecute, is clothed with all the powers and privileges of the prosecuting attorney, and all acts done by him in that capacity must be regarded as if done by the prosecuting attorney himself. 32 Cyc. 724; Parish v. United States, 100 U. S. 500, 25 L. Ed. 763; May v. United States, 236 Fed. 495, 149 C. C. A. 547.

[3] The further objection is made that the verification is made on information and belief. There is no statute which requires the verification of an information. It is only where it is sought to issue a warrant that the Constitution requires that there must be the affidavit of one who knows the facts. Weeks v. United States, 216 Fed. 292, 132 C. C. A. 436, L. R. A. 1915B, 651, Ann. Cas. 1917C, 524.

[4] Error is assigned to the denial of the motion of plaintiff in error for a directed verdict, and our attention is directed to section 56, part 3, of the Selective Service Regulations, which provides:

> "Citizens and persons who have declared their intention to become citizens, residing abroad, are not required to register."

The record shows that the plaintiff in error made no motion for a directed verdict. We have looked into the testimony, however, sufficiently to see that there was evidence which tended to prove that his residence was at Eureka, Mont., which was his place of registration. He admitted that he was not a citizen of Canada, and had taken no steps to become such, and that he was in Eureka on the day of registration. The evidence was that his father had two farms, one near Eureka, in Montana, and one in Canada, a short distance across the border; that the plaintiff in error spent a portion of his time at Eureka, where he maintained a lodging room and kept some of his clothes, and where he received a portion at least of his mail; and that he spent portions of his time on his father's farm in Canada.

[5] It is contended that the court below erred in denying the plaintiff in error the opportunity to prove that he had been furnished with an opinion from the local legal advisory board to the effect that he was not required to register. To this it is to be said, first, that no exception was taken to the ruling of the court, and no assignment of error is directed thereto. Again, there was no offer to show that the opinion had been given on or prior to June 5, 1917. From the fact that the advisory boards were not created until November 8, 1917, when the Selective Service Regulations were promulgated, it is to be inferred that the opinion was furnished after that date. In that case the opinion could be no defense to the failure to register on June 5, 1917.

[6] Error is assigned to the admission of a number of vouchers given to the plaintiff in error in February, 1917, which upon their face indicate that at that time he was acting as deputy sheriff of Lincoln county, Mont. His brother at that time was the sheriff of that county, and at his brother's instance the plaintiff in error conveyed a man to an insane asylum and received the vouchers in payment of his expenses. The sheriff testified that he did not make a written appointment of his brother as a deputy sheriff, and it is argued that there is no statutory prohibition against the appointment of a nonresident as deputy sheriff. The court below ruled that the vouchers were public records assumed to be authentic, and that the fact that the plaintiff in error acted in that capacity was a circumstance which the jury might consider. In that view we agree. The vouchers were properly taken into consideration, to be given the value to which the jury might think they should be entitled, in connection with the other evidence as to the actual residence of the plaintiff in error on June 5, 1917.

[7] A witness was asked whether he was acquainted with the common knowledge in the community in which he lived as to where the home of the plaintiff in error was. An objection to the question was sustained, and to that ruling error is now assigned. It is sufficient to say in answer that no exception was reserved to the court's ruling.

We find no error. The judgment is affirmed.

(257 Fed. 706)

SCOTT v. CLINE.*

(Circuit Court of Appeals, Eighth Circuit. May 7, 1919.)

No. 5232.

BANKRUPTCY ⚷143(10)—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD IN TRUST FOR BANKRUPT.

Trustee of a bankrupt corporation *held* entitled to recover real estate held in the name of a person who, with his family, owned all the stock of the corporation, on the ground that it was held in trust for the company, but not entitled to such person's homestead and other property in which funds of the company were not invested.

⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied September 1, 1919.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Joseph W. Woodrough, Judge.

Suit in equity by M. E. Cline, trustee in bankruptcy of the Grove Lumber Company, against W. A. Scott. Decree for complainant, and defendant appeals. Modified.

Charles B. Rogers, of Tulsa, Okl. (F. A. Fulghum, of Tulsa, Okl., on the brief), for appellant.

William F. Tucker, of Tulsa, Okl. (Hulette F. Aby, of Tulsa, Okl., on the brief), for appellee.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This is a suit in equity brought by Cline, as trustee in bankruptcy against Scott, seeking a decree declaring that Scott holds the legal title to three parcels of real estate in trust, and ordering him to convey the same to the trustee. The trial court found in favor of the trustee, and entered a decree accordingly, which this appeal seeks to review.

Scott was the owner of the Grove Lumber Company. He and his family held all its stock. For some time prior to May, 1917, he had been engaged in purchasing lots, taking the title in his own name, erecting houses thereon out of the proceeds of a mortgage placed on the property, and out of materials furnished by the Grove Lumber Company. Some of the evidence indicates that these houses were built for a specific purpose under contract with parties to furnish them a home. A distinctive feature of the scheme was that the purchaser could pay off the mortgage in monthly installments instead of paying rent. Each property was carried in a separate account on the books of the Grove Lumber Company, and the materials and labor which went into the house were charged against it in this account. The project seems to have worked well enough until the war came on. Then the great increase in the cost of material and labor made it impossible to complete houses that were in process of erection, for the price that had been agreed upon. This involved the Grove Lumber Company heavily in debt.

In January, 1917, the situation was so critical that Scott had a conference with his largest creditor, the Longbell Lumber Company, and at the instance of that company he signed a written contract scheduling all the real property standing in his name, and stating that the same was held in trust for the Grove Lumber Company; also turning over all the accounts receivable of the Grove Lumber Company. As a part of this transaction he agreed that if the creditors would give him until June 1, 1917, he would undertake personally to pay their claims in full. The consideration for the entire agreement was the extension of time upon the debts of his company, so that he could make collections of outstanding accounts and marshal its resources. It was upon this basis that he signed the document. The very next day after the document was signed, a petition in involuntary bankruptcy was filed against the company, its property seized by a receiver, and an adjudication obtained in due course. It is not claimed that any cred-

itor extended a dollar's credit on the faith of his declaration that he held the parcels of land which he scheduled in trust for his company. On the contrary, the evidence plainly shows that all its indebtedness was incurred prior to that time, so there is no estoppel here. Cline was at first appointed receiver, and afterwards trustee in bankruptcy, and has been in possession of the entire property of the Grove Lumber Company.

The trial court dealt with the case in a rather sweeping way. We do not think that can be done. The different parcels here involved each stand upon a separate basis, and in order to do justice in the case the evidence as to each property must be considered. Acting upon that basis, we will take up the separate properties.

1. Lot 6, block 4, of Kirkpatrick Heights addition to the city of Tulsa: This property was purchased by Mr. Scott as a home. In making the purchase he used $250 of Grove Lumber Company money, and $200 in the form of a note which he held against the party from whom he purchased. The balance of the purchase price, $550, consisted of a second mortgage on the property which the purchasers assumed. A mortgage for $3,000 was given on the property, and the erection of a house started. Out of this mortgage the Grove Lumber Company was paid in full the $250, and for all material which it supplied for the house. The note and mortgages were both signed by Mr. Scott and his wife. The house was not completed at the time of the adjudication in bankruptcy. Subsequent to that date Scott paid out $1,600 of his own money for putting a heating plant into the property, wiring it, putting in a plumbing system, and constructing sidewalks adjacent to it. He moved into the house as a home in May, 1917, and has continuously resided there ever since. He has paid the monthly payments due on the mortgage out of his own private funds. These have amounted to something like $1,000. The decree of the trial court takes all this private investment by Scott in property which from the beginning he intended as his home, and turns it over to the trustee in bankruptcy, and thereby not only applies these personal funds to the payment of the debts of the Grove Lumber Company, but likewise deprives Scott of a home. The decree as to this lot is clearly wrong and should be reversed.

2. Lots 5 and 6 in block 5, Orchard's addition: This property was paid for by an automobile, but the automobile business was carried on as a branch of the business of the Grove Lumber Company. The house on this property had been completed some time before Mr. Scott bought it. It was listed, however, upon the books of the Grove Lumber Company as the property of the company, and was constantly so treated by Scott. For that reason the decree should be affirmed as to this property.

3. Lot 1, block 9, East Lynne addition: That was purchased in July, 1916, by a check of the Grove Lumber Company for $225. Mr. Scott testified, however, that the check was charged to him in the accounts of his company, and, as he owned the company, it would not be unnatural that he should draw checks upon the account for a small private investment like this. He was receiving a salary of

$250 a month from his company. The distinctive feature in regard to this East Lynne property is this: There was no building on it at the time it was purchased, and no building was put on it until after the proceedings in bankruptcy had been started, and Mr. Cline had taken possession of all of the lumber company's effects. The building was contracted for in May, 1917, and erected by a man by the name of Tubbs. It was paid for out of a mortgage on the property. Some of the material that went into the building was purchased at the yards of the Grove Lumber Company from Mr. Cline as trustee in bankruptcy, but all such purchases were paid in full. These purchases were small. Most of the material for the building was purchased of other concerns, and was paid for out of the mortgage. Scott testifies that neither the lot nor the building which he erected on it after the appointment of the trustee in bankruptcy were intended as a part of the assets of the company. He sold this property November 30, 1917. It will therefore be impossible for him to perform the decree by conveyance to the trustee. We think the evidence, as a whole, especially the fact that the building was erected after the proceedings in bankruptcy had been instituted, and all the property of the Lumber Company was in Cline's possession, shows that this property never belonged to the Lumber Company, and the decree as to it is erroneous.

The decree of the trial court is modified, being reversed as to Cline's homestead and the East Lynne property, and affirmed as to the other property, without costs to either party.

(257 Fed. 709)

B. V. D. CO. v. ISAAC et al.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1919.)

No. 3197.

1. INJUNCTION ⟹34—RIGHTS OF SELLER—INJUNCTION AGAINST REMOVAL OF MARKS.

A manufacturer of underwear, despite its claim of preservation of good will, could not restrain a jobber who purchased the goods from others from removing secret marks on each carton, placed there by the manufacturer to enable it to detect those of its selected list of jobbers to whom it sold who were cutting prices, since the manufacturer parted with all control over the merchandise and cartons by absolute sale.

2. CONTRACTS ⟹116(1)—RESTRAINT OF TRADE—INJUNCTION AGAINST REMOVAL OF SECRET MARKS.

A manufacturer of underwear, which sold only to selected jobbers, could not restrain a jobber, unable to buy directly from it, and who bought from others, from removing certain secret marks on the bottom of each carton of goods, where one of the purposes of the manufacturer in so marking the cartons was to enable it to determine which of its wholesalers cut prices, so that such wholesalers might be stricken from the selected list of jobbers, an unlawful restraint of trade which equity will not aid.

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by the B. V. D. Company against Morris Isaac and others. From decree dismissing the bill, plaintiff appeals. Affirmed.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Hans v. Briesen, of New York City, and Murray Seasongood, of Cincinnati, Ohio, for appellant.

James N. Ramsey, of Cincinnati, Ohio, for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

KNAPPEN, Circuit Judge. Plaintiff manufactures the so-called "B. V. D." underwear, consisting of two-piece suits not protected by patent, as well as union suits, as to which rights under patent are claimed. It sells only to a selected list of jobbers, about 350 in number out of about 850 applicants. Previous to the decision of the Sanatogen Case, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, it sold its union suits under a strict price maintenance agreement. As to the two-piece suits there was no such agreement. Since December 7, 1916 (more than three years after the Sanatogen decision), plaintiff's acknowledgments of receipts from jobbers of orders for goods, both union and two-piece suits, have been accompanied by a form letter expressly designed to secure price maintenance in fact. The statement not only says:

> "We consider it important that in the distribution of these goods the prices to be received therefor shall not be either greater or less than those which are fairly reasonable to all concerned. A schedule of prices which we deem fair to all under present conditions is herein set forth"

—but also:

> "Any B. V. D. goods which shall be shipped to you should not therefore be sold at prices greater or less than our latest retailers' prices."

Defendant is a jobber at Cincinnati. It had been unable to buy directly from plaintiff, although it had offered complete assurance that prices would not be cut. It was thus compelled to buy from others. Several years before the Sanatogen decision plaintiff inaugurated a system of placing a selected serial number upon the bottom of each carton contained in a given case. This secret mark, being entered on plaintiff's books, furnished means of identifying the jobber to whom the box had been shipped and plaintiff claims this enabled it to prevent fraudulent substitution. Defendant claimed and exercised the right to remove these secret marks from cartons containing plaintiff's goods. It was to enjoin this action that the bill was filed. Defendant justifies its action as necessary to protect the jobbers from whom it has bought against the consequences of selling below plaintiff's prescribed prices.

The District Court dismissed the bill on the grounds, first, that plaintiff parted with the title to its goods and their enclosing cartons when it sold them, and that it had no concern with defendant's treatment of the cartons after the latter had acquired full ownership; and, second, that one of the purposes, if not the real purpose, of plaintiff in putting the secret mark on the cartons is to enable it to determine which of its wholesalers is cutting prices, with a view of striking the offender from the selected list of jobbers.

[1, 2] The District Court was clearly right in dismissing the bill.

The broad rule that the seller of merchandise outright parts with all control over it is no longer open to question. While the decisions to this effect have been for the most part in suits where the protection with respect to price maintenance was claimed under patent, copyright or trade-mark, yet the rule stated was applied, not because of such features, but in spite of them, and upon the fundamental ground that the control of the owner over the article sold ended with the complete passing of title. Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; The Sanatogen Case, supra; Straus v. Victor Talking Mach. Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955; Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959; Boston Store v. Amer. Graphophone Co., 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447.

The question of price restriction apart, there is no merit in the claim that plaintiff has retained such an interest in preserving its own good will as will support its claimed right to relief. The sale of its goods was absolute, and completely passed title, not only to the goods themselves, but to their inclosing cartons. No authorities are cited, nor have we found any, which, since the line of decisions above referred to, lend support to plaintiff's claim. In Coca-Cola Co. v. Bennett, 238 Fed. 513, 151 C. C. A. 449 (so far as material here), it was merely held unfair competition for the purchaser of plaintiff's goods in bulk to sell them in bottles bearing plaintiff's name and trade-mark when plaintiff had already sold to others the sole bottling privilege. Ingersoll v. Doyle (D. C.) 247 Fed. 620, was a case of trade-mark infringement. The recent "Associated Press" decisions seem to us not at all in point. Neither is there application in cases like Wells, etc., Co. v. Abraham (C. C.) 146 Fed. 190 (s. c., 149 Fed. 408, 79 C. C. A. 228); and Miles Medical Co. v. Goldthwaite (C. C.) 133 Fed. 794, where (before the Sanatogen decision) provisions expressly designed to enforce price restrictions were sustained.

The case of B. V. D. Co. v. Kommel, 200 Fed. 559, 119 C. C. A. 39, specially relied upon by plaintiff, is not persuasive of its contention. Not only was that case decided several years before the Sanatogen Case, but what was there said favorable to plaintiff is merely obiter, and apparently not even the unanimously accepted view of the court. Manifestly, cases involving protection of marks on articles still belonging to a plaintiff have no application. Conceding that plaintiff's secret system is susceptible of entirely legitimate and proper use, and even that it was not used illegitimately in the present case, the action below was nevertheless right. There was here no invasion of trade-mark, and no breach or attempted breach of any legitimate trust relation on the part of either defendants or their vendors.

The suggestion that the erasure of the serial number will enable the sale of former season goods as if put out during the current season, and thus affect plaintiff's good will, relates to a condition too remote and unsubstantial to justify the attempted restriction, especially as the purchasers from the plaintiff's jobbers were under no obligation

even to retain or use the boxes in which the goods were originally sold, and sales of past season goods were not forbidden.

It cannot, however, be said that the conclusion of the District Court that plaintiff's reason for using its secret marking system embraced at least the enforcement of its price maintenance system, and thus was an unlawful restraint of trade, is without justification. To say the least, equity will not lend its aid to an attempt of that nature. True, the testimony of plaintiff's president denied such purpose, but in view of all the other testimony in the case, the court was not bound to accept that statement at its face value. The District Judge heard and saw the witnesses, and his conclusions should not be disturbed.

The decree of the District Court is affirmed.

(257 Fed. 712)

THE ITALIER.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 20.

1. SEAMEN ⟹23—WAGES—PAYMENTS AT INTERMEDIATE PORTS.
   Advance wages paid seamen on a foreign ship, who signed in a foreign port, where such payment was legal, are to be deducted in computing the half wages due at an intermediate port, under Seamen's Act, § 4 (Comp. St. § 8322).
2. SEAMEN ⟹4, 21—FORFEITURE OF WAGES—DESERTION—SEAMEN'S ACT.
   The offense of desertion in the mercantile marine is not abolished by Seamen's Act, § 4 (Comp. St. § 8322), and such desertion entails a forfeiture of all wages due.
3. SEAMEN ⟹34—"DESERTION."
   "Desertion," in the sense of the maritime law, is a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Desertion.]
4. SEAMEN ⟹24—WAGES—PART PAYMENT AT INTERMEDIATE PORTS.
   A demand is essential to the right to half wages at an intermediate port, under Seamen's Act, § 4 (Comp. St. § 8322), and such demand must be made while the seaman is still in the ship's service.
5. SEAMEN ⟹24—HALF WAGES—PAYMENT AT INTERMEDIATE PORTS.
   As seamen on foreign vessels have no rights under Seamen's Act, § 4 (Comp. St. § 8322), until they arrive within a harbor of the United States, the five-day period which must elapse before demand for half wages may be made thereunder begins to run on the arrival of the ship in such harbor.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by Constant Janssens and others against the steamship Italier; Vital Delgoffe, claimant. Decree for libelants, and claimant appeals. Reversed.

This action was brought by 11 seamen and firemen on the Belgian steamship Italier, to recover wages and damages for waiting time under R. S. §§ 4529 and 4530, as amended by the Seamen's Act of March 4, 1915 (38 Stat. 1164, 1165, c. 153, §§ 3, 4 [Comp. St. §§ 8320, 8322]).

Libelants had shipped on this Belgian vessel at English and Italian ports for a voyage which had not expired when the Italier put into New York on October 6, 1916. On October 10th, 6 of the libelants caused to be served on the master a written notice as follows: "I hereby demand one-half my wages earned in accordance with section 4530 of the United States Revised Statutes." This notice was dated October 9th, but not served until the day following, for reasons which appear immaterial.

Prior to the service of this paper all the libelants who testified had either left the ship or formed the intention of so doing, and had ceased to work. Some said they went back at night, and to sleep. One man who did not sign the written notice remained aboard until the 10th, when he disappeared without making any proven demand under the statute.

Janssens petitioned for an order allowing proceedings in forma pauperis on October 10th, and on the same day the libel herein was filed, stating that he, "together with the other members of the crew who wished to be joined as colibelants in this action," made demand under section 4530. The verification of the libel then enumerates the names of the 11 libelants. The record contains no evidence that New York was a port where the Italier either loaded or delivered cargo.

The court below gave a decree in favor of some of the libelants (without making any explanation as to why all should not recover, if any did) and directed that in computing the amounts due "the advance notes advanced to the" libelants in England "should not be regarded as a credit to the ship." Claimant appeals.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter and John M. Woolsey, both of New York City, of counsel), for appellant.

L. C. Boehm, of New York City, for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] 1. The Italier is a foreign vessel, and libelants shipped elsewhere than in the United States. Therefore, under The Talus, 248 Fed. 670, 160 C. C. A. 570 (affirmed 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200, December 23, 1918), the court below erred in directing that no credit should be given to the ship in respect of advances made to the libelants beyond the boundaries of the United States.

[2] 2. It seems to be thought (judging from the tenor of argument in this and similar causes) that the Seamen's Act of 1915 has abolished the offense of desertion in the mercantile marine. While it is true that arrest for desertion, the bodily return of a deserter to his ship, and generally the holding of a seaman to his shipping contract by physical force, are things of the past, even in respect of foreign vessels so far as the United States is concerned (sections 16–18), desertion is still an offense on American vessels, entailing (inter alia) forfeiture of "all or any part of the wages or emoluments which the [deserter] has then earned" (R. S. § 4596, as amended).

"Desertion" is not defined by any act of Congress. Quite possibly the definition of desertion varies in different countries. This record does not inform us whether Belgium defines desertion in any special way. Although the Belgian law would control, if proven (The Nigretia, 255 Fed. 56, 166 C. C. A. 384), we may, in the absence of such evidence, apply the general maritime law.

[3] The definition of desertion "in the sense of the maritime law" is settled, and consists in "a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty." Cloutman v. Tunison, 1 Sumn. 373, Fed. Cas. No. 2,907, where the subsequent cases are collated. Within this definition we have no doubt on the evidence that all the libelants who made demand for half wages deserted before the presentation of such demand.

[4] 3. It seems, also, to be thought that the demand for half wages under R. S. § 4530, as amended, is a ceremony of no moment, and may be made (as it was made in this case) after the seaman leaves his ship (in Judge Story's phrase) animo dereliquendi. Such is not the case. The seaman's is a lawful engagement and its propriety is to be judged primarily by the law of the ship's flag. But Congress has plainly declared that, when foreign vessels are in harbors of the United States, R. S. § 4530, as amended, shall apply to seamen on such vessels. Therefore such seamen are entitled to one-half of the wages earned down to the time of demand made, and such demand must be made within the territorial jurisdiction of the United States, and at a port where said vessel "shall load or deliver cargo."

[5] But no such demand can be made "before the expiration of nor oftener than once in five days." As seamen on foreign vessels have no rights under this statute until they arrive within a harbor of the United States, it is, we think, evident that the five-day period begins to run upon arrival in such harbor. The intimation to the contrary in The Delagoa (D. C.) 244 Fed. 835, is disapproved.

But, since a deserter may forfeit all his wages, it is also a prerequisite to recovery under the statute that there should be wages due him when he makes demand, and there are no wages due to a deserter.

4. The decision below was therefore wholly erroneous in not finding that those libelants to whom awards were made had either deserted before demand made under the statute, or had never made a demand pursuant to the statute.

5. The defense that there was no evidence that New York was for the Italier a port of either loading or discharging, and that on October 10th five days had not elapsed after arrival in the harbor, is not pleaded, but has been argued. Our view of the point, therefore, is stated rather for future guidance than as dispositive of the present cause.

Decree reversed, and cause remanded, with directions to dismiss the libel.

MEMORANDUM DECISIONS

(257 Fed. 987)

ACKERMAN v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. April 16, 1919.) No. 194. In Error to the District Court of the United States for the Eastern District of New York. Criminal prosecution by the United States against Jacob Ackerman for illegal sale of liquor to a soldier. Judgment of conviction, and defendant brings error. Affirmed. R. F. Adams, of Long Island City, N. Y., for plaintiff in error. Melville J. France, U. S. Atty., of New York City. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed.

(257 Fed. 987)

ARKADELPHIA MILLING CO. v. ST. LOUIS SOUTHWESTERN RY. CO. et al. (Circuit Court of Appeals, Eighth Circuit. March 25, 1919.) No. 4857. Appeal from the District Court of the United States for the Eastern District of Arkansas. W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., and V. M. Miles, of Ft. Smith, Ark., for appellant. J. M. Moore and George A. McConnell, both of Little Rock, Ark., for appellees.

PER CURIAM. Appeal dismissed per stipulation of parties; costs in this court to be equally divided.

(257 Fed. 987)

BERBILIS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. January 27, 1919.) No. 5370. In Error to the District Court of the United States for the District of Nebraska. William Simeral, of Omaha, Neb., for plaintiff in error. T. S. Allen, U. S. Atty., of Lincoln, Neb., and F. A. Peterson, Asst. U. S. Atty., of Omaha, Neb.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, for want of prosecution, on motion of defendant in error.

(257 Fed. 987)

BOATMEN'S BANK v. LAWS et al. (Circuit Court of Appeals, Eighth Circuit. March 19, 1919.) No. 5214. Appeal from the District Court of the United States for the Eastern District of Missouri. Sears Lehmann, of St. Louis, Mo., for appellant. Grant & Grant, of St. Louis, Mo., for appellees.

PER CURIAM. Appeal dismissed, with costs, on the ground that the questions involved have been decided in No. 197, original, 257 Fed. 299, 168 C. C. A. 665, petition to revise between the same parties.

(257 Fed. 988)

COCHRAN et al. v. BECKER. (Circuit Court of Appeals, Eighth Circuit. January 20, 1919.) No. 5231. In Error to the District Court of the United States for the Eastern District of Missouri. Bertram B. Beshoar, of Denver, Colo., for plaintiffs in error. Oliver J. Miller, of St. Louis, Mo., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of defendant in error. See, also, 257 Fed. 988, 168 C. C. A. 666.

(257 Fed. 988)

COCHRAN et al. v. BECKER. (Circuit Court of Appeals, Eighth Circuit. January 20, 1919.) No. 5247. Appeal from the District Court of the United States for the Eastern District of Missouri. Bertram B. Beshoar, of Denver, Colo., for appellants. Oliver J. Miller, of St. Louis, Mo., for appellee.

PER CURIAM. Appeal dismissed, with costs, on motion of appellee. See, also, 257 Fed. 988, 168 C. C. A. 666.

(257 Fed. 988)

CORNELL v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 5093. In Error to the District Court of the United States for the Eastern District of Missouri. Charles F. Krone and Clore Warne, both of St. Louis, Mo., for plaintiff in error. Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., Charles P. Williams, Sp. Asst. Atty. Gen., and Vance J. Higgs, Asst. U. S. Atty., of St. Louis, Mo.

PER CURIAM. Writ of error dismissed, without costs to either party, in this court, on motion of counsel for defendant in error, for failure to file briefs.

(257 Fed. 988)

HASTY et al. v. ST. LOUIS SOUTHWESTERN RY. CO. et al. (Circuit Court of Appeals, Eighth Circuit. March 25, 1919.) No. 4858. Appeal from the District Court of the United States for the Eastern District of Arkansas. W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., and V. M. Miles, of Ft. Smith, Ark., for appellants. J. M. Moore and George A. McConnell, both of Little Rock, Ark., for appellees.

PER CURIAM. Appeal dismissed, per stipulation of parties; costs in this court to be equally divided.

(257 Fed. 988)

HUTCHISON v. HOUSTON et al. (Circuit Court of Appeals, Eighth Circuit. January 27, 1919.) No. 5371. Appeal from the District Court of the United States for the District of Kansas. J. G. Hutchison, of Kansas City, Mo., for appellant. J. Harvey Frith and Gilbert H. Frith, both of Emporia, Kan., and A. L. Berger, of Kansas City, Kan., for appellee Houston.

PER CURIAM. Cause docketed, and appeal dismissed, with costs, on motion of appellee Houston, pursuant to rule 16 (188 Fed. xi, 109 C. C. A. xi).

(257 Fed. 988)

KUNTZ v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 5329. In Error to the District Court of the United States for the District of North Dakota. Edward S. Allen, of Bismarck, N. D., for plaintiff in error. Melvin A. Hildreth, U. S. Atty., of Fargo, N. D.

PER CURIAM. Cause docketed, and writ of error dismissed, on motion of defendant in error under rule 16 (188 Fed. xi, 109 C. C. A. xi) without costs to either party in this court.

(257 Fed. 989)

LARSON v. DICKINSON. (Circuit Court of Appeals, Eighth Circuit. January 21, 1919.) No. 5261. In Error to the District Court of the United States for the Southern District of Iowa. Jefferis & Tunison, of Omaha, Neb., for plaintiff in error. Sargent & Gamble, of Des Moines, Iowa, for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of defendant in error.

(257 Fed. 989)

LONG v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 5328. In Error to the District Court of the United States for the District of North Dakota. Edward S. Allen, of Bismarck, N. D., for plaintiff in error. Melvin A. Hildreth, U. S. Atty., of Fargo, N. D.

PER CURIAM. Cause docketed, and writ of error dismissed, on motion of defendant in error under rule 16 (188 Fed. xi, 109 C. C. A. xi) without costs to either party in this court.

(257 Fed. 989)

LOWRY v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 4920. In Error to the District Court of the United States for the Western District of Oklahoma. E. E. Grinstead, of Hominy, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Judgment of District Court reversed, without costs to either party in this court, and cause remanded, with directions to sustain demurrer to indictment, on confession of error by counsel for defendant in error.

(257 Fed. 989)

McCRAY v. WEST HELENA CONSOLIDATED CO. (Circuit Court of Appeals, Eighth Circuit. March 12, 1919.) No. 5211. In Error to the District Court of the United States for the Eastern District of Arkansas. C. P. Harnwell, of Little Rock, Ark., for plaintiff in error. Bevens & Mundt, of Helena, Ark., and Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, Ark., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, in accordance with opinion of this court filed in case No. 5203, West Helena Consolidated Company v. Lora McCray, 256 Fed. 753, 168 C. C. A. 99.

(257 Fed. 989)

MEIER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. April 10, 1919.) No. 5176. In Error to the District Court of the United States for the Northern District of Iowa. Redmond & Stewart, of Cedar Rapids, Iowa, for plaintiff in error. Frank A. O'Connor, U. S. Atty., of Dubuque, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, per stipulation of parties.

(257 Fed. 989)

PANTHER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 4921. In Error to the District Court of the United States for the Western District of Oklahoma. Charles A. Holden and Charles B. Peters, both of Pawhuska, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Judgment of District Court reversed, without costs to either party in this court, and cause remanded, with directions to sustain demurrer to indictment, on confession of error by counsel for defendant in error.

(257 Fed. 990)

PARKER v. RICHARD. (Circuit Court of Appeals, Eighth Circuit. May 27, 1918.) No. 5147. Appeal from the District Court of the United States for the Eastern District of Oklahoma. See, also, 245 Fed. 330, 157 C. C. A. 522. Decree reversed 250 U. S. 235, 39 Sup. Ct. 442, 63 L. Ed. —. W. P. McGinnis, U. S. Atty., and Alvin F. Mooney, Sp. Asst. U. S. Atty., both of Muskogee, Okl., for appellant. J. B. Lucas and Britton H. Tabor, both of Checotah, Okl., for appellee.

PER CURIAM. Appeal dismissed, without costs to either party in this court.

(257 Fed. 990)

ROPER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 17, 1918.) No. 5340. In Error to the District Court of the United States for the Eastern District of Oklahoma. Denton & Lee, of Muskogee, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., and C. W. Miller, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

PER CURIAM. Cause docketed, and writ of error dismissed, on motion of defendant in error, under rule 16 (188 Fed. xi, 109 C. C. A. xi) without costs to either party in this court.

(257 Fed. 990)

ST. LOUIS SOUTHWESTERN RY. CO. et al. v. SOUTHERN COTTON OIL CO. (Circuit Court of Appeals, Eighth Circuit. March 25, 1919.) No. 4856. Appeal from the District Court of the United States for the Eastern District of Arkansas. J. M. Moore, of Little Rock, Ark., for appellants. W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., and V. M. Miles, of Ft. Smith, Ark., for appellee.

PER CURIAM. Appeal dismissed per stipulation of parties; costs in this court to be equally divided.

(257 Fed. 990)

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. CONSOLIDATED FUEL CO. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 5327. Appeal from the District Court of the United States for the Eastern District of Oklahoma. E. B. Perkins, of Dallas, Tex., Daniel Upthegrove, of St. Louis, Mo., W. B. Hamilton, of Dallas, Tex., and Clifford L. Jackson, of Muskogee, Okl., for appellant. Jones & Foster, of Muskogee, Okl., for appellee.

PER CURIAM. Cause docketed, and appeal dismissed, with costs, on motion of appellee, under rule 16 (188 Fed. xi, 109 C. C. A. xi).

(257 Fed. 990)

SHANNON v. CARBON COAL CO. et al. (Circuit Court of Appeals, Eighth Circuit. January 15, 1919.) No. 5112. Appeal from the District Court of the United States for the Eastern District of Oklahoma. W. P. McGinnis, U. S. Atty., J. C. Wilhoit, Sp. Asst. U. S. Atty., and C. W. Miller, Asst. U. S. Atty., all of Muskogee, Okl., for appellant. Fuller & Porter and Gordon & McInnis, all of McAlester, Okl., for appellees.

PER CURIAM. Appeal dismissed with costs on motion of appellees.

(257 Fed. 990)

SLATER, Public Adm'r, v. THOMPSON et al. (Circuit Court of Appeals, Eighth Circuit. January 13, 1919.) No. 5222. Appeal from the District Court of the United States for the Eastern District of Missouri. See, also, 255 Fed. 768, 167 C. C. A. 112. Wells H. Blodgett, George B. Webster, Henry W. Blodgett, and Walter N. Fisher, all of St. Louis, Mo., for appellant. Taylor, Chasnoff & Willson, of St. Louis, Mo., for appellees.

PER CURIAM. Appeal dismissed, on motion of appellees Theodore Rassieur, administrator d. b. n. c. t. a., et al.

(257 Fed. 991)

UNITED STATES v. KILPATRICK BROS. CO. (Circuit Court of Appeals, Eighth Circuit. January 3, 1919.) No. 5152. In Error to the District Court of the United States for the District of Nebraska. Thomas S. Allen, U. S. Atty., of Lincoln, Neb. Hazlett & Jack, of Beatrice, Neb., for defendant in error.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of counsel for plaintiff in error.

(257 Fed. 991)

UNITED ZINC & CHEMICAL CO. v. VAN BRITT et al. (Circuit Court of Appeals, Eighth Circuit. January 29, 1919.) No. 5239. In Error to the District Court of the United States for the District of Kansas. Ashley & Gilbert, of Kansas City, Mo., for plaintiff in error. Fred Robertson, of Kansas City, Kan., and F. J. Oyler, of Iola, Kan., for defendants in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of defendants in error.

(257 Fed. 991)

UTAH COPPER CO. v. KERN. (Circuit Court of Appeals, Eighth Circuit. January 9, 1919.) No. 5322. In Error to the District Court of the United States for the District of Utah. Van Cott, Riter & Farnsworth, of Salt Lake City, Utah, for plaintiff in error. Thomas Marioneaux and Stott & Warner, all of Salt Lake City, Utah, for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, per stipulation of parties.

(257 Fed. 991)

WATERS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. January 17, 1919.) No. 5363. In Error to the District Court of the United States for the Western District of Oklahoma. William H. England, of Ponca City, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, on motion of defendant in error, under rule 16 (188 Fed. xi, 109 C. C. A. xi).

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⚷68 (U.S.C.C.A.Mich.) When it is discovered, after an action at law is brought on a policy of insurance, that a reformation is necessary, for which a bill in equity must be filed, the action at law will be held in abeyance until the case in equity is concluded.—Prudential Casualty Co. v. Miller, 458.

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II. EXCLUSION OR EXPULSION.

⚷23(2) (U.S.C.C.A.Ohio) Where a Chinese person has been regularly admitted as a merchant, the fact that he subsequently becomes a laborer does not in itself destroy his right to remain, for such a fact is important only as it may tend to show that in reality he entered as a laborer, or for the purpose of immediately becoming a laborer, and so procured his admission through fraud, in violation of the Exclusion Acts.—Lo Hop v. U. S., 493.

⚷32(3) (U.S.C.C.A.Ohio) Under the treaty with China of December 8, 1894, and Act April 27, 1904 (Comp. St. § 4337), authorizing the issuing of certificates by Chinese authorities showing the mercantile status of Chinese persons desiring to enter the United States, and making such certificates prima facie evidence of the facts set forth, a Chinese person, who was admitted on the production of such a certificate, and whose deportation was thereafter sought on the ground that he had not shown his right to remain, must be advised if deportation is sought on the ground that his

entry was fraudulent, for such certificates are entitled to weight, and Chinese persons should be notified of any attack thereon.—Lo Hop v. U. S., 493.

⟹32(5) (U.S.C.C.A.Ohio) One admitting that he was of Chinese descent has the burden of establishing a lawful right to remain in the United States.—Lo Hop v. U. S., 493.

III. IMMIGRATION.

⟹54 (U.S.C.C.A.Cal.) Evidence in deportation proceedings against a Chinese person *held* to warrant an order for her deportation, on the ground that she was found employed in or connected with a house of prostitution, or resort frequented by prostitutes, and that she had been sharing in or deriving benefits from the earnings of prostitutes.—Jung Back Sing v. White, 456.

⟹54 (U.S.C.C.A.La.) Where an alien was held under an order of deportation, made by a board of special inquiry and affirmed by the Secretary of Labor, order being based upon finding that alien was a person coming to this country for an immoral purpose, findings on habeas corpus proceeding that alien was denied a fair hearing by immigration authorities, and that "she is not of an immoral character and is entitled to admission to the United States," entitled the alien to be released from custody.—Mayo v. U. S., 185.

ALLIES.

See Criminal Law, ⟹304.

ANIMALS.

See Appearance, ⟹20; Customs and Usages, ⟹130.

⟹35 (U.S.C.C.A.Tex.) On information by the United States against a cattle company for forfeiture of cattle for unlawful importation, wherein individuals intervened and claimed the cattle or their value, judgment that the interveners recover from the cattle company possession of the cattle, and, if they were not delivered, recover a sum per head, the value as assessed for each head not delivered, *held* proper.—Morris Land & Cattle Co. v. Kilpatrick, 134.

APPEAL AND ERROR.

See Army and Navy, ⟹20; Costs, ⟹251; Courts, ⟹405; Criminal Law, ⟹1032–1186; Estoppel, ⟹68; Exceptions, Bill of.

For review of rulings in particular actions or proceedings, see also the various specific topics.

I. NATURE AND FORM OF REMEDY.

⟹11 (U.S.C.C.A.Ohio) Under Act Sept. 6, 1916, § 4 (Comp. St. § 1649a), though it was apparently the purpose to have the decree considered on both appeal and error, and the record was somewhat confused, the court will treat the case as properly before it on appeal.—Lo Hop v. U. S., 493.

III. DECISIONS REVIEWABLE.

(E) Nature, Scope, and Effect of Decision.

⟹95 (U.S.C.C.A.Wash.) An order of a District Court denying an application by a stranger to be substituted as complainant in a suit is not appealable.—Sumpter Lumber Co. v. Sound Timber Co., 448.

⟹110 (U.S.C.C.A.Iowa) Ruling on a motion for new trial is not assignable as error in the federal courts.—Salyers v. U. S., 339.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

⟹169 (U.S.C.C.A.Okl.) On writ of error an appellate court can only review those issues which were heard in the court below.—Interstate Compress Co. v. Agnew, 49.

(B) Objections and Motions, and Rulings Thereon.

⟹237(6) (U.S.C.C.A.N.D.) Where an action at law is tried in a federal court without a jury, and the legal effect of the evidence is not challenged by the defeated party, by motion for a finding in his favor or for a declaration of law of the same purport, the sufficiency of evidence to support special findings of fact cannot be considered by the appellate court, and all that can be reviewed is whether the special findings sustain the judgment, and whether during the progress of the trial errors of law occurred to which exceptions were preserved.—Caldwell v. Blodgett, 90.

(C) Exceptions.

⟹273(11) (U.S.C.C.A.Wis.) Because of the dual functions of the trial judge sitting without a jury, to determine whether there is any substantial evidence to support one or the other party, and, if there is, then, whether it preponderates on one or the other side, the request or motion to adjudge either all the issues or some specific issues in favor of the requesting party or against the adverse party, to be reviewable, must make apparent that it is based specifically on the ground that there is no substantial evidence to sustain any other conclusion.—Raymer v. Netherwood, 368.

VI. PARTIES.

⟹330(2) (U.S.C.C.A.Wash.) A Circuit Court of Appeals has jurisdiction to entertain an original application for substitution of parties in a suit which has been brought into that court by appeal, regardless of the action of the District Court in denying a similar application.—Sumpter Lumber Co. v. Sound Timber Co., 448.

Where the interests of a party to an appeal devolve upon another, either by operation of law or act of the parties, the person acquiring such interests will usually be allowed to be substituted, and to prosecute or defend the appeal in place of the original party.—Id.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

⟹373(1) (U.S.C.C.A.Wash.) An appeal will not be dismissed, on the ground that no citation was served and no bond filed in the court below, when the appeal was taken in open court

and bond has been filed in the appellate court.—Sumpter Lumber Co. v. Sound Timber Co., 448.

(D) Writ of Error, Citation, or Notice.

⚷397 (U.S.C.C.A.Wash.) An appeal will not be dismissed, on the ground that no citation was served and no bond filed in the court below, when the appeal was taken in open court and bond has been filed in the appellate court.—Sumpter Lumber Co. v. Sound Timber Co., 448.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(K) Questions Presented for Review.

⚷684(2) (U.S.C.C.A.Canal Zone) The overruling of a motion for a second continuance will not be reversed, where the evidence, if any, adduced on the hearing, is not in the record, so that there is no showing that the ruling was improper.—Panama R. Co. v. Curran, 114.

⚷684(4) (U.S.C.C.A.Tex.) Where testimony, on which the action of the District Judge in denying motion to dismiss suit on ground its subject-matter had been destroyed was based, is not in the record, the Circuit Court of Appeals cannot determine that the action taken was erroneous.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

⚷709 (U.S.C.C.A.Canal Zone) Action of court in refusing to compel giving of security for costs will not be reversed, where record does not contain the evidence on the hearing of the motion.—Panama R. Co. v. Curran, 114.

XI. ASSIGNMENT OF ERRORS.

⚷719(7) (U.S.C.C.A.Tenn.) Where burnt cotton, which had been salvaged, was destroyed while in transit, and no inherent defect or vice was suggested, except the existence of smouldering fire, and that was fully covered by the charge, the refusal of a request that there could be no recovery if the fire originated because of inherent defect or vice of cotton will not be considered on appeal; no assignment of error having been taken, and the case not being one where the court should, under rule 11 (202 Fed. viii, 118 C. C. A. viii), review the ruling without an assignment.—Southern Ry. Co. v. Pettit, 613.

⚷750(2) (U.S.C.C.A.Ohio) Where the record does not show that plaintiff was given an opportunity to amend his petition after demurrer was sustained to it, the absence of specific assignment for failure to give such permission, as distinguished from the assignment of error in entering judgment for defendant, should not prevent review under rule 11 of the Circuit Court of Appeals (202 Fed. viii, 118 C. C. A. viii).—Hodges v. Erie R. Co., 498.

XII. BRIEFS.

⚷758(1) (U.S.C.C.A.Ark.) If the Circuit Court of Appeals concludes to notice a manifest error not specified according to rule No. 24 (188 Fed. xvi, 109 C. C. A. xvi), there is no implication that it has undertaken the task of going through the record and examining other errors not specified.—Coco-Cola Co. v. Moore, 34.

XVI. REVIEW.

(A) Scope and Extent in General.

⚷843(2) (U.S.C.C.A.La.) On appeal from an order granting an injunction, the question of the propriety of the issuance of an injunction will not be reviewed, where the injunction is no longer effective.—Louisiana Agricultural Corporation v. Pelican Oil Refining Co., 168.

⚷849(1) (U.S.C.C.A.Mo.) Where an action at law was tried to the court, jury being waived, a general finding for one party made, with no requests for general or special findings or declarations of law by the other party, the appellate court can review only the rulings of the trial court on the admission and exclusion of evidence.—Kindred v. Black, 386.

⚷856(3) (U.S.C.C.A.Ark.) Where a verdict is directed on limited, but untenable, grounds, it may not be sustained on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated, if they had been called to the attention of the defeated party, and he had been given an opportunity to meet them by evidence and argument.—Thorn v. Browne, 469.

(E) Presumptions.

⚷931(6) (U.S.C.C.A.Tex.) Where the trial was to the court, it will be assumed that no improper evidence was considered.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

(F) Discretion of Lower Court.

⚷966(1) (U.S.C.C.A.Canal Zone) Both under Panama law and general principles motion for continuance is addressed to discretion of trial court, and action thereon is not reviewable, unless abuse of discretion is shown.—Panama R. Co. v. Pigott, 183.

⚷977(1) (U.S.C.C.A.Canal Zone) Both under Panama law and general principles, motion for new trial is addressed to discretion of trial court, and action thereon is not reviewable, unless abuse of discretion is shown.—Panama R. Co. v. Pigott, 183.

(G) Questions of Fact, Verdicts, and Findings.

⚷1003 (U.S.C.C.A.Ohio) A federal appellate court does not weigh the evidence, though it must be satisfied that there is proper evidence in law sufficient to support the verdict.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷1009(1) (U.S.C.C.A.Mo.) A finding of fact by a chancellor, who heard the witnesses, will not be reversed, except in a clear case.—Hamlin v. Grogan, 271.

⚷1012(1) (U.S.C.C.A.Ill.) Where trial judge saw and heard the witnesses, findings upon issues of fact will not be set aside, unless the cold type in the record demonstrates findings either were unsupported by the evidence, or were made in the face of a preponderance to the contrary.—Ætna Ins. Co. v. Davidson S. S. Co., 280.

(H) Harmless Error.

⚷1026 (U.S.C.C.A.Tex.) A judgment is not to be reversed because of an omission which did not have the effect of depriving the party com-

plaining of any substantial right.—Morris Land & Cattle Co. v. Kilpatrick, 134.

⟹1039(8) (U.S.C.C.A.Ark.) Error in denying the motion to make the allegations of negligence in the complaint more definite does not require reversal, where there was no claim that the defendant was surprised at the trial, or unprepared to meet the plaintiff's case, and depositions had been taken, which indicated the acts of negligence relied on.—West Helena Consol. Co. v. McCray, 99.

⟹1048(6) (U.S.C.C.A.Tenn.) In action for the value of burnt cotton, which was destroyed in transit after it had been salvaged, refusal to permit cross-examination of plaintiff as to the amount paid for the cotton, which the carrier desired to introduce on the question of value, *held* harmless; there being no showing of the expense of handling, salvaging, repicking the cotton, etc.—Southern Ry. Co. v. Pettit, 613.

⟹1051(1) (U.S.C.C.A.Tex.) The erroneous introduction in evidence of a decree was harmless, where there was ample evidence outside of the record to show the fact of title for which the decree was used.—Keith Lumber Co. v. Houston Oil Co., of Texas, 213.

⟹1064(1) (U.S.C.C.A.Ohio) In an action against a railroad for injuries to a motor truck owner and driver at a crossing, where the evidence fairly admitted finding that the view was not so obstructed, and there was not so much noise as to prevent a careful and prudent person from discovering the train, *held* not prejudicial error to qualify the railroad's requested instruction on plaintiff's duty to stop before crossing to the extent that was done by the court.—Lake Erie & W. R. Co. v. Schneider, 625.

⟹1064(1) (U.S.C.C.A.Tenn.) In an action by a negro passenger, wounded in an exchange of shots between the conductor and another negro passenger, giving of instructions on the conductor's right to shoot in self-defense, and the refusal to charge thereon as requested, *held* not error prejudicial to the street railway company.—Memphis St. Ry. Co. v. Pierce, 609.

⟹1067 (U.S.C.C.A.Tenn.) In an action by a negro passenger, wounded in an exchange of shots between the conductor and another negro passenger, giving of instructions on the conductor's right to shoot in self-defense, and the refusal to charge thereon as requested, *held* not error prejudicial to the street railway company.—Memphis St. Ry. Co. v. Pierce, 609.

(I) Error Waived in Appellate Court.

⟹1078(4) (U.S.C.C.A.Ohio) Where nothing is said in the brief in support of an assignment of error to the reception of evidence, it must be regarded as waived.—Erie R. Co. v. Schleenbaker, 617.

APPEARANCE.

⟹20 (U.S.C.C.A.Tex.) On information for forfeiture of cattle imported from Mexico without entry and inspection, where, when defendant filed exception or motion that the part of the intervener's answer which prayed judgment against defendant be stricken out, defendant was represented in the cause by attorneys whose appearance was general, by appearing and pleading to the claim asserted against it by the intervener's answer, defendant waived the issuance of process, and by invoking decision as to the merits of the claim asserted abandoned any rights it might have had to refrain from joining issue until notified or required.—Morris Land & Cattle Co. v. Kilpatrick, 134.

ARGUMENT OF COUNSEL.

See Criminal Law, ⟹721½-723.

ARMY AND NAVY.

See Conspiracy, ⟹28, 45, 47; Criminal Law, ⟹37, 97, 371, 406, 450, 723, 763, 764, 822, 1170; Habeas Corpus, ⟹16; Indictment and Information, ⟹125, 140, 150; Intoxicating Liquors, ⟹236; Perjury, ⟹9, 19; Public Lands, ⟹120; War, ⟹4.

⟹20 (U.S.C.C.A.Mont.) A nondeclarant alien resident of the United States is not ineligible to military duty under Selective Service Act May 18, 1917 (Comp. St. 1918, §§ 2044a-2044k), but the facts which bring him within the exempted class must be affirmatively proved by him before his local draft board, to which is given power to hear and determine, subject to review by appeal to a district board, all questions of exemption under the act; a decision of the district board being made final.—Napore v. Rowe, 178.

⟹20 (U.S.C.C.A.Mont.) An information charging a violation of the Selective Service Act (Comp. St. 1918, §§ 2044a-2044k), in that defendant willfully failed and refused to present himself for registration on June 5, 1917, is not fatally defective for want of an allegation that defendant is a citizen of the United States.—Brown v. U. S., 653.

In a prosecution under the Selective Service Act (Comp. St. 1918, §§ 2044a-2044k) for failure to present himself for registration on June 5, 1917, evidence *held* not to show that defendant was entitled to the direction of a verdict in his favor, on the ground that he was not bound to register under Selective Service Regulations, § 56, pt. 3, declaring that citizens and persons who have declared their intention to become citizens, residing abroad, are not required to register.—Id.

An opinion by the local legal advisory board to the effect that defendant was not required to register is no defense to a prosecution for failure to register on June 5, 1917, as required by the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k); the advisory boards not being created until November of that year, when the Selective Service Regulations were promulgated.—Id.

In a prosecution under the Selective Service Act (Comp. St. 1918, §§ 2044a-2044k) for failure to register on June 5, 1917, vouchers given to defendant in February, 1917, which on their face indicated that he was at that time acting as deputy sheriff for Lincoln county, Mont., *held* admissible in evidence; defendant's contention being that he was then a resident of Canada.—Id.

⟹20 (U.S.C.C.A.Wash.) In a prosecution for violating the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k), whether defendant, domiciled with his parents in Seattle, Wash., by registering with a local draft board in Idaho while on his way to New York to study, had intend-

ed to evade military duty, *held* for the jury under the evidence.—Pass v. U. S., 77.

In a prosecution for violating the Selective Service Law (Comp. St. 1918, §§ 2044a–2044k), instruction *held* fairly to present the main issue whether defendant, domiciled with his parents in Seattle, Wash., intended to evade military service when he registered with a local board in Idaho while on his way to New York to study.—Id.

⟹20 (U.S.C.C.A.Wash.) A resident of Seattle, Wash., where his parents lived, in so far as he had any domicile, who left his wife in the city and started to work his way to New York to study, by failing to register in Seattle under the Selective Service Law (Comp. St. 1918, §§ 2044a–2044k), violated such law, though he registered at a point in Idaho, and, if his failure to register in Seattle or his evasion of the requirements of the law was willful, he could be convicted.—Pass v. U. S., 81.

⟹40 (U.S.C.C.A.Nev.) Assuming that defendant might be loyal, though he characterized the Draft Act as unjust, and stated that he would fight conscription, yet, if he made the statement with evil mind, intending to bring about insubordination, disloyalty and refusal of duty in the military service, he was guilty of a violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), and in a prosecution based on such statement, defendant's acts, speech, and state of mind are matters for consideration in determining whether he was guilty.—Shidler v. U. S., 570.

The mere utterance of seditious words in the presence of a person subject to military duty under the Selective Service Law (Comp. St. 1918, §§ 2044a–2044k), if intended to induce insubordination, disloyalty, or refusal of duty, is sufficient to constitute an offense under Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c); so in a prosecution under such section, based on such utterances, an instruction that to constitute an attempt to commit a crime there must be specific intent to commit it, followed by an overt act, was confusing and properly refused.—Id.

⟹40 (U.S.C.C.A.R.I.) Indictment charging defendant with willfully obstructing the recruiting and enlistment service of the United States, by making certain statements in addressing a public meeting, in violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), *held* sufficient.—Coldwell v. U. S., 151.

⟹40 (U.S.C.C.A.S.D.) Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), is valid. The obstruction of the military service of the United States need not be by physical acts, but may be by written or spoken words, and the government is not required to show that some particular person was dissuaded from entering the service.—Heynacher v. U. S., 273.

ASSAULT AND BATTERY.

See Appeal and Error, ⟹1064, 1067; Carriers, ⟹321; Homicide.

ASSESSMENT.

See Taxation, ⟹397–498.

ASSIGNMENTS.

See Bankruptcy, ⟹326; Carriers, ⟹58; Champerty and Maintenance, ⟹6; Courts, ⟹312; Covenants, ⟹121; Estoppel, ⟹68; Insurance, ⟹122, 648; Patents, ⟹202.

I. REQUISITES AND VALIDITY.

(B) Mode and Sufficiency of Assignment.

⟹50(1) (U.S.C.C.A.La.) Assuming that the mere insertion of the words "against 214 B/C" in the body of a draft could render it a conditional order on a particular fund, such could not be the case, where, for a considerable time prior to the transaction, there was a running account between the drawer and the drawee, and at the date of the draft the drawer had a credit with the drawee, and no accounts were kept of particular shipments of cotton, the drawer having established a credit with his cotton business as a basis, and the drawee was reimbursed by and made a profit out of the cotton.—Hubbard Bros. & Co. v. Southern Pac. Co., 107.

ASSUMPTION OF RISK.

See Master and Servant, ⟹204.

ATTACHMENT.

See Bankruptcy, ⟹387, 391.

ATTORNEY AND CLIENT.

See Carriers, ⟹321; Champerty and Maintenance, ⟹6; Criminal Law, ⟹721½, 723, 1055; District and Prosecuting Attorneys; Evidence, ⟹142, 487, 543, 572; Habeas Corpus, ⟹25; Libel and Slander, ⟹25, 41, 112; Perjury, ⟹9.

II. RETAINER AND AUTHORITY.

⟹102 (U.S.C.C.A.Miss.) Where a casualty insurer sent its local attorney a letter declining to pay a policy holder's claim for loss, which letter was libelous, the insurer was not liable to the policy holder for its attorney's unauthorized act in showing the letter to a third person; the attorney alone being liable.—Sullivan v. Metropolitan Casualty Ins. Co. of New York, 72.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

⟹166(3) (U.S.C.C.A.Ark.) In suit for compensation as attorneys in defendant company's suit to restrain unfair trade competition by another firm, plaintiffs' evidence of the amount of business done by defendant company in the United States generally was properly admitted not to show defendant's ability to pay, but as bearing on the results obtained by the litigation.—Coco-Cola Co. v. Moore, 34.

ATTORNEY GENERAL.

See District and Prosecuting Attorneys, ⟹3; Indictment and Information, ⟹52.

ATTRACTIVE NUISANCE.

See Negligence, ⚷23.

AUTOMOBILES.

See Internal Revenue, ⚷42; Railroads, ⚷350; Street Railroads, ⚷90, 114.

BAIL.

See Principal and Surety, ⚷185.

BAILMENT.

⚷14(1) (U.S.C.C.A.Okl.) A bailee for hire is only bound to use ordinary diligence in the care of the property bailed, and in the absence of a statute prohibiting it may limit his liability by contract, except for gross negligence, willful act, or fraud.—Interstate Compress Co. v. Agnew, 199.

BANKRUPTCY.

See Banks and Banking, ⚷257; Corporations, ⚷590; Criminal Law, ⚷1169.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(B) Voluntary Proceedings.

⚷43 (U.S.C.C.A.Mich.) A gas company in a city of Michigan, a majority of whose stock and bonds was owned by a Delaware holding company, no statute either of Michigan or Delaware prohibiting such ownership by the Delaware company, was entitled to go into bankruptcy, and its proceedings therein cannot be regarded in judicial contemplation as an undue interference with suit by the city and another against the gas company and the holding company to enjoin an increase in the charge for gas, which the gas company had notified the city was necessary.—City of Holland v. Holland City Gas Co., 629.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

⚷143(10) (U.S.C.C.A.Okl.) Trustee of a bankrupt corporation *held* entitled to recover real estate held in the name of a person who, with his family, owned all the stock of the corporation, on the ground that it was held in trust for the company, but not entitled to such person's homestead and other property in which funds of the company were not invested.—Scott v. Cline, 656.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

⚷160 (U.S.C.C.A.N.J.) Insolvency, within the definition of Bankruptcy Act July 1, 1898, § 1 (Comp. St. § 9585), may, and in many cases must, be proved by proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred.—Rosenberg v. Semple, 284.

Evidence *held* to warrant a finding that bankrupt was insolvent at time of transfer of his accounts.—Id.

⚷163 (U.S.C.C.A.Wash.) Where the directors of an insolvent corporation, in good faith and with the intention of saving the business, borrowed money from a director and a stockholder to meet the most pressing obligations, and executed a real and chattel mortgage on all of the corporate assets to secure the same, *held*, the transaction being one in good faith, that the mortgage could not, on the corporation's subsequent bankruptcy, be questioned on the ground that it was preferential and to an officer of the corporation.—In re Lake Chelan Land Co., 501.

⚷165(3) (U.S.C.C.A.Ill.) Where one, fraudulently induced to sell goods on credit, accepted from the buyer, within four months preceding a petition in bankruptcy against the buyer, a transfer of accounts in payment for the goods, the transfer was made in consideration of release of right to rescind and recover the goods, and was not a preference.—Illinois Parlor Frame Co. v. Goldman, 384.

⚷166(3) (U.S.C.C.A.Tenn.) A creditor of one member of bankrupt partnership, which was hopelessly insolvent, who received from his debtor in partial payment of notes not due merchandise bought to his knowledge entirely on credit of the firm, and who also had intimate knowledge of its affairs, *held* to have such knowledge of its insolvency as rendered the payment a voidable preference.—Gooch v. Stone, 581.

⚷181 (U.S.C.C.A.N.J.) Where the value of property transferred by a bankrupt to his wife was not disproportionate to the bankrupt's pecuniary obligation of support to her, in suit by his trustee against the wife to set aside the conveyance as in violation of the Bankruptcy Act, the equitable doctrine that, where the consideration for a conveyance is inadequate, the conveyance will be sustained only to the extent of the consideration actually given, has no application.—Baldwin v. Kingston, 538.

⚷188(3) (U.S.C.C.A.Va.) Where bankrupt, after recording a trust deed securing his notes, which latter he delivered to payee, retained the deed and executed other notes purporting to be those secured by it, upon which he borrowed money from a bank, not only was the lien of the first payee on the mortgaged property a prior one, but the bank acquired no equitable lien on the property superior to the claims of unsecured creditors as represented by bankrupt's trustee, especially since Code Va. 1904, § 2463, makes parol liens void as against creditors.—Page v. Old Dominion Trust Co., 442.

(D) Administration of Estate.

⚷223 (U.S.C.C.A.Okl.) Where a duty is imposed upon a referee by the bankruptcy law, and compensation is also fixed for its performance, the bankruptcy court has no power or authority to allow any further compensation.—U. S. v. Ward, 412.

Where a duty is clearly imposed by the bankruptcy law upon a referee, and no specific compensation is fixed for its performance, the compensation expressly authorized by the law

as a whole is the only compensation which he can receive, or that the court has power to allow.—Id.

An allowance by a court of bankruptcy of necessary expenses incurred by officers in administration of estates, which under Bankruptcy Act July 1, 1898, § 62 (Comp. St. § 9646), is within the power of the court, is not subject to collateral attack, but can only be reviewed by direct proceedings.—Id.

A court of bankruptcy may, in the exercise of a sound discretion, refer issues to special masters, and may name a referee as such special master, and his fees and expenses as such are within the control of the court, and its judgment in such matters is not subject to collateral attack.—Id.

A court of bankruptcy may authorize a referee to employ a clerk and allow an expense for stationery, office rent, light, heat, and phone, and such authorizations may be made by standing rule or order, or by special order in any particular case.—Id.

⚷224 (U.S.C.C.A.Okl.) A court of bankruptcy may in the exercise of a sound discretion refer issues to special masters and may name a referee as such special master.—U. S. v. Ward, 412.

⚷230 (U.S.C.C.A.Okl.) Where a referee has collected from parties or estates in bankruptcy proceedings moneys as compensation to which he is not legally entitled, and these fees have been collected or withheld from parties who are numerous, and the individual amounts small, the United States may maintain a single action on his bond, on behalf of all parties injured, to recover back such illegal fees.—U. S. v. Ward, 412.

In an action by the United States on the official bond of a referee in bankruptcy, on behalf of numerous parties from whom he has collected illegal fees, it is not necessary that all such parties should be named in the complaint.—Id.

A court of bankruptcy being without jurisdiction to allow a referee under any form or guise any other or further compensation than expressly authorized and prescribed by the bankruptcy law, such allowance, if made, does not bar an action for its recovery.—Id.

The taking of fees by a referee in excess of those prescribed by the statute is not a "judicial act," and as such protected from an action for an accounting.—Id.

Sureties on the bond of a referee conditioned for the faithful performance of his official duties are liable for fees illegally collected or retained by him.—Id.

(E) Actions by or Against Trustee.

⚷293(2) (U.S.C.C.A.Tenn.) With defendant's consent a bill in equity by a trustee to recover a preference may be entertained by a District Court.—Gooch v. Stone, 581.

(F) Claims Against and Distribution of Estate.

⚷326 (U.S.C.C.A.Mo.) Where a creditor stockholder of a bankrupt corporation had a claim against the bankrupt for $20,853.94, and his indebtedness on his stock was $10,000, for which amount corporation's trustee in bankruptcy recovered judgment, after which the stockholder was himself adjudged a bankrupt, his assignee could not have the amount of the judgment credited on the amount of the assigned claim and dividends on the balance of the claim paid to it, but dividends on such claim were first applicable on the judgment until that should be extinguished, and then, if there were other dividends, they were applicable to payment of the claim.—Boatmen's Bank v. Laws, 383.

⚷328 (U.S.C.C.A.Ky.) Under Bankruptcy Act § 57n (Comp. St. § 9641), claims shall not be proved subsequent to one year after adjudication in bankruptcy, except where claims are liquidated by litigation and final judgment is rendered within 30 days before or after expiration of the time, when they may be proved, if filed within 60 days after rendition of the judgment.—Moore v. Simms, 524.

Claim sought to be proved against a bankrupt's estate by his coguarantors, who with him agreed to pay to banks all money advanced for a certain company, *held* not "liquidated by litigation," within Bankruptcy Act, § 57n (Comp. St. § 9641), extending the time for filing of claims so liquidated; the bankrupt not having been a party to suits by a bank.—Id.

⚷331 (U.S.C.C.A.Ky.) Where a bank had the right to prove its claim against a bankrupt, who had signed a guaranty of repayment to it of moneys advanced to a company, the bankrupt's coguarantors had the right, under Bankruptcy Act, § 57i (Comp. St. § 9641), to prove the bank's claim in case the latter failed to do so, and whether the indebtedness was then due or not.—Moore v. Simms, 524.

⚷340 (U.S.C.C.A.Iowa) Assuming it to be permissible for a claimant to trace personal property wrongfully sold by a person subsequently becoming a bankrupt into accounts receivable belonging to the bankrupt, such tracing must be specific and the identification clear. The burden of proof is on claimant, and a mere showing that the general assets of bankrupt, including accounts receivable, have been increased by the wrongful sale, is not sufficient.—Central State Bank v. McFarlin, 519.

⚷345 (U.S.C.C.A.Ill.) Where a president of a bankrupt corporation advanced money to the corporation to enable it to carry through a composition agreement, president stating in a circular letter to the creditors, "To effect the settlement, $2,500 in cash, which is no part of the assets of the corporation, has been put up to guarantee the first payment," the agreement being intended to give to the settlement creditors priority in any liquidation of the assets, the agreed subordination of the rights of such lender to those of other creditors will be enforced.—In re George C. Bruns Co., 186.

IV. COMPOSITION.

⚷387 (U.S.C.C.A.Cal.) In view of Bankruptcy Act July 1, 1898, §§ 67c, 67f, 70f (Comp. St. §§ 9651, 9654), confirmation of an offer of composition by bankrupt debtor prior to any adjudication in bankruptcy dissolved liens of attachment placed within four months of the commencement of bankruptcy proceedings, un-

der section 14c (section 9598).—In re Lilienthal, 165.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

⟹391(3) (U.S.C.C.A.Cal.) The District Court in bankruptcy has jurisdiction to issue an order staying, until adjudication or until dismissal of the petition for adjudication of bankruptcy, proceedings in actions in state courts in which attachment had been placed upon the bankrupt's property within four months prior to the commencement of bankruptcy proceedings.—In re Lilienthal, 165.

⟹404(1) (U.S.C.C.A.Wis.) Discharges in bankruptcy should follow as a matter of right, where no objections are filed by the creditors or trustee, the parties in interest, to application seasonably made.—In re Walsh, 47.

⟹407(5)(U.S.C.C.A.Ill.) Credit extended to a bankrupt by a bank through its cashier, who knew that the bankrupt was then insolvent, and who was acting solely in his own and the bankrupt's interest, was fraudulent and voidable, and the bank was not bound by its cashier's fraud, and could claim that the money was obtained by means of a material false statement in writing as to money not checked out, where the directors of the bank examined note signed by bankrupt and false financial statement attached thereto, and, relying thereupon, approved the loan.—Bank of Commerce & Savings v. Matthews, 376.

⟹413(½) (U.S.C.C.A.Wis.) As a discharge in bankruptcy operates merely to extinguish creditors' claims, no one other than a creditor can be a party in interest, and, under well-recognized rules, strangers to the proceeding cannot be heard to object, particularly in view of Bankruptcy Act, § 14b (Comp. St. § 9598) and General Orders in Bankruptcy rule 32 (18 Sup. Ct. ix).—In re Walsh, 47.

⟹415(2) (U.S.C.C.A.Wis.) Under Bankruptcy Act, § 38 (Comp. St. § 9622), the referee in bankruptcy has no power to interfere in regard to the discharge of the bankrupt, though the court, notwithstanding the section, may refer matters arising out of the bankrupt's application for discharge to the referee as a special master.—In re Walsh, 47.

⟹415(3) (U.S.C.C.A.Wis.) The District Court should not on its own motion interpose objections to a bankrupt's discharge, since it sits to try, not to create, the issue.—In re Walsh, 47.

⟹418(1) (U.S.C.C.A.Wis.) Discharge in bankruptcy operates merely to extinguish creditors' claims.—In re Walsh, 47.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(B) Appeal.

⟹467 (U.S.C.C.A.N.J.) Nothing less than a demonstration of plain mistake warrants overturning of finding by referee, concurred in by court on review, of insolvency of bankrupt at time of transfer of his accounts, made on evidence taken in presence of referee, and in some particulars vague, indefinite, uncertain, and conflicting, and involving questions of credibility.—Rosenberg v. Semple, 284.

⟹467 (U.S.C.C.A.Wash.) Findings of the referee, affirmed by the District Court, and supported, will not be set aside by the Circuit Court of Appeals.—In re Lake Chelan Land Co., 501.

⟹468 (U.S.C.C.A.Ill.) On appeal from an order discharging a bankrupt over an objection that the bankrupt had obtained money by means of a materially false statement in writing, where it was found that the master had erred in finding that the false statement was not relied upon by the bank in extending the credit, and it appeared the master had made no finding as to whether the statement in writing was known to be false by the bankrupt, a finding by the trial judge from the printed record that the bankrupt did not read the statement or know its contents will not be allowed to stand, and the order of discharge will be reversed, so that the uncontradicted testimony of the bankrupt to such effect can be heard and its truth decided upon an observation of the witness, as well as upon his testimony.—Bank of Commerce & Savings v. Matthews, 376.

BANKS AND BANKING.

See Bankruptcy, ⟹188, 328, 331, 407, 468; Carriers, ⟹57, 58; Criminal Law, ⟹369, 400, 402, 1169; Estoppel, ⟹88.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

⟹117 (U.S.C.C.A.Tex.) One to whom a bank's president, in payment of his individual debt, issued its certificate of deposit, accepted with knowledge thereof, took the risk of the president's authority, depending on whether there had been a contemporaneous deposit, as recited in the certificate; the principle that his general powers would give apparent authority not applying, where he is known to be acting in his own interest.—First Nat. Bank of Sweetwater, Tex., v. Rust, 241.

⟹118 (U.S.C.C.A.Tex.) One to whom a bank's president issued its certificate of deposit in payment of his individual debt, accepted with knowledge thereof, seeking to hold the bank thereon, has the burden of proving the making of the recited contemporaneous deposit, necessary for the authority to issue certificate.—First Nat. Bank of Sweetwater, Tex., v. Rust, 241.

A bank's certificate of deposit having been issued by its president in payment of his individual debt, and accepted with knowledge thereof, neither recital in certificate nor statement in letter of president to person receiving the certificate is evidence against bank of deposit having been made, necessary for president's authority to issue certificate.—Id.

IV. NATIONAL BANKS.

⟹253 (U.S.C.C.A.Alaska) In an action by a national bank against a former director to recover on account of excessive loans to alleged separate institutions, etc., *held*, that such institutions were branches maintained by the bank to purchase gold dust, so statements to the comptroller showing the condition of accounts

between the bank and branches were not notice to the director of loans to the branches, or of loans made to borrowers under authority of the bank.—First Nat. Bank of Fairbanks v. Noyes, 543.

A director of a national bank, who was not familiar with banking business, *held* not negligent because he did not examine into advances made by the bank to branches which it maintained, and no recovery can be had on ground of excessive loans by the branches, where the president and majority stockholder of the bank represented all sums sent to the branches were for purchase of gold dust.—Id.

In an action by a national bank against a former director to recover, on the theory that a dividend had improperly been declared, *held*, that the declaration of the dividend, which was at the suggestion of the Comptroller of the Currency to wind up branches of the bank, was not improper, and no liability could be predicated thereon, as practically the whole of the dividend was immediately transferred to the bank by the stockholders.—Id.

Where a national bank seeks to recover against a director for a loss resulting from the director's violation of a duty imposed by the National Banking Act, proof of something more than negligence is required, and there must be proof that the violation was in effect intentional.—Id.

Directors of a national bank owe a common-law duty to exercise ordinary care and prudence in the administration of the affairs of the bank, and they should not be shielded from liability for want of knowledge of wrongdoing, if that ignorance is the result of gross inattention; but they cannot be held responsible for the wrongful act of other directors, nor to intimately know to whom credits are given.—Id.

⚷254 (U.S.C.C.A.Alaska) In an action by a national bank against a director to recover for various losses, including improper extension of credits, claimed to have resulted from the director's neglect, evidence *held* insufficient to show that the director was liable, either at common law or under the National Banking Act.—First Nat. Bank of Fairbanks v. Noyes, 543.

⚷256(1) (U.S.C.C.A.Ohio) In a prosecution under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of a national banking association for directing false entries in the books, a showing that the false entries were made with intent to deceive is essential to conviction.—Galbreath v. U. S., 598.

⚷256(3) (U.S.C.C.A.Ohio) In a prosecution, under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of a national banking association for misapplication of funds and for directing false entries in the books, a showing that the false entries were made with intent to deceive, and that the misapplications were made to injure or defraud bank, is essential to conviction.—Galbreath v. U. S., 598.

An intent to injure or defraud a national banking association by misapplication of funds, which offense is defined by Rev. St. § 5209 (Comp. St. § 9772), is not inconsistent with the desire for the ultimate success and welfare of the bank, and such intent may, within the meaning of the law, result from an unlawful act voluntarily done, the natural tendency of which is to injure the bank.—Id.

⚷257(3) (U.S.C.C.A.Ohio) In a prosecution against the president of a national banking association and his successor, under Rev. St. § 5209 (Comp. St. § 9772), for directing false entries in the books with intent to deceive and for misapplication of funds, evidence *held* sufficient to sustain a conviction.—Galbreath v. U. S., 598.

In a prosecution under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of the national bank for misapplying funds and making false entries in the books, which practices occurred in connection with loans and advances to a company in which those officers were interested, the admission in evidence of parts of the record in bankruptcy proceedings of such company, showing it was adjudicated a bankrupt on admission in writing that it was entirely insolvent, and that dividends of only 10 per cent. were paid, was proper, though the last transaction charged in the indictment occurred six months before the bankruptcy.—Id.

⚷257(4) (U.S.C.C.A.Ohio) In a prosecution, under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of a bank for making false entries in the books and misapplying funds, evidence *held* sufficient to carry to the jury the question whether the entries were made with intent to deceive and the misapplications with intent to injure or defraud the bank.—Galbreath v. U. S., 598.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

See Assignments, ⚷50; Bankruptcy, ⚷166, 188, 407; Carriers, ⚷55, 56; Corporations, ⚷218, 542; Mortgages, ⚷25; Payment, ⚷22.

VII. PAYMENT AND DISCHARGE.

⚷434 (U.S.C.C.A.La.) Ordinarily the drawee of a bill of exchange must determine at his peril the genuineness of the signature of the drawer, and, if the ostensible maker of a forged note pays the note, he cannot recover the amount.—Hubbard Bros. & Co. v. Southern Pac. Co., 107.

BONDS.

See Appeal and Error, ⚷373; Bankruptcy, ⚷43, 230; Corporations, ⚷542, 586; Costs, ⚷251; Drains, ⚷49; Pleading, ⚷248; Poisons, ⚷123; Principal and Surety, ⚷123, 145, 151, 162, 185; Sales, ⚷202, 218½; Trade-Marks and Trade-Names, ⚷100; United States, ⚷67; Witnesses, ⚷244, 255.

BRIBERY.

See Conspiracy, ⚷47; Criminal Law, ⚷450, 723.

⚷11 (U.S.C.C.A.Mo.) Evidence *held* insufficient to sustain a conviction of one of two de-

fendants jointly indicted for bribery of a post office clerk and of conspiracy to commit such offense, but sufficient to sustain the conviction of his codefendant of the former offense.—Kirkwood v. U. S., 171.

BROKERS.

See Frauds, Statute of, ⟹115, 116; Sales, ⟹202, 218½.

IV. COMPENSATION AND LIEN.

⟹54 (U.S.C.C.A.Tenn.) Where a realty broker procured a purchaser acceptable to the owner, and ready, able, and willing to buy on the agreed terms, his right to recover the agreed compensation from the owner, though the sale fell through on account of a deficiency in acreage, was not impaired by the owner's giving, after execution of the sale contract, a written promise to pay the broker his specified compensation.—Robinson v. Parham, 527.

⟹63(1) (U.S.C.C.A.Tenn.) Realty broker is entitled to compensation, where he procures a purchaser acceptable to the owner, and ready, able, and willing to buy on the agreed terms, though the sale fails of consummation through the fault of the owner alone.—Robinson v. Parham, 527.

V. ACTIONS FOR COMPENSATION.

⟹85(1) (U.S.C.C.A.Ark.) Evidence of purchases and sales of cotton futures, including the seller's and buyer's slips, *held* competent in an action by the brokers against their principal to recover a balance due on the transactions.—Thorn v. Browne, 469.

BURGLARY.

See Insurance, ⟹143; Reformation of Instruments, ⟹30.

CANALS.

See Waters and Water Courses, ⟹27.

CANAL ZONE.

See Railroads, ⟹5½.

CANCELLATION OF INSTRUMENTS.

See Covenants, ⟹121; Estoppel, ⟹68; Public Lands, ⟹120.

CARRIERS.

See Appeal and Error, ⟹719, 1048, 1064, 1067; Shipping, ⟹166.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(B) Interstate and International Transportation.

⟹25 (U.S.C.C.A.Tenn.) Rule of the Interstate Commerce Commission providing that burnt cotton, which is cotton that has been on fire, and which has not been subsequently repicked and rebaled, must not be offered for shipment until it has been reconditioned, or until not less than five days have elapsed since the last evidence of fire therein, does not forbid shipment of cotton which had been part of a larger mass that had been on fire after five days elapsed, merely because there was fire in other cotton about 200 yards distant at the time of the shipment.—Southern Ry. Co. v. Pettit, 613.

⟹32(2) (U.S.C.C.A.Neb.) A provision in a lease of land by an interstate railroad company for a smelter plant site, by which in consideration of the rental, etc., it agreed to do intraplant switching of cars, wholly disconnected from their transportation over its road, free of charge, *held* not invalid as a device to cover the giving of rebates.—American Smelting & Refining Co. v. Union Pac. R. Co., 83.

⟹38 (U.S.C.C.A.Ill.) Claims for refunds for switching charges paid on prior inbound shipments into Chicago from the West could not be granted or enlarged by a subsequently enacted tariff, and hence the joint freight tariff, effective on the Pennsylvania line January 18, 1907, was not authority for a refund on inbound shipments received prior thereto.—Pennsylvania Co. v. U. S., 345.

The Chicago Joint Minimum Switching Tariff, which became effective November 1, 1898, relating to absorption of switching charges and rebates, had no relevancy to switching charges on inbound shipments from the line of a Western road.—Id.

Actual discrimination between shippers is not a necessary element of a violation of the Elkins Act, as amended by the Hepburn Act (U. S. Comp. St. § 8597); departure from the published rate being sufficient.—Id.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

⟹55 (U.S.C.C.A.La.) The insertion of the figures and letters "against 214 B/C" in the face of a draft, to which was attached a bill of lading for 214 bales of cotton, did not destroy its characteristics as a negotiable instrument in Louisiana, or New York, where the Uniform Negotiable Instruments Law was in force, being merely indicative of a particular fund out of which reimbursement was to be made.—Hubbard Bros. & Co. v. Southern Pac. Co., 107.

⟹56 (U.S.C.C.A.La.) The indorsement of an ordinary draft for collection does not make the indorser a guarantor to the drawee of the genuineness of bills of lading attached, nor of the quantity or quality of the commodity shipped.—Hubbard Bros. & Co. v. Southern Pac. Co., 107.

⟹57 (U.S.C.C.A.La.) Where a railroad converted a shipment of cotton by delivering it on a forged bill of lading, a bank holding the true bill of lading as collateral may recover from the railroad the entire value of the cotton, with interest.—Hubbard Bros. & Co. v. Southern Pac. Co., 107.

⟹58 (U.S.C.C.A.La.) Where a cotton dealer sold cotton and drew on the buyer, placing the true bills of lading as collateral with a bank, and sending to the purchaser a forged bill of lading, which the latter presented, obtaining the cotton, the buyer should be considered an equitable assignee of the seller, and is entitled, on recovery by bank of judgment against the railroad for conversion, to any balance after pay-

ment of secured debt.—Hubbard Bros. & Co. v. Southern Pac. Co., 107.

(C) Custody and Control of Goods.

⚷71 (U.S.C.C.A.La.) A common carrier can recover against one who receives goods upon a forged bill of lading purporting to have been issued by an agent of another carrier; the law fixing liability resulting from such a bill of lading not undertaking to make each of the agents of all the lines an agent of all of the connecting lines.—Hubbard Bros. & Co. v. Southern Pac. Co., 107.

The mere fact that a railroad had previously delivered cotton to a buyer on forged bills of lading does not prevent the railroad from recovering from such buyer the value of the cotton delivered on a forged bill of lading purporting to have been issued by a connecting carrier, on the ground that the buyer was misled by the negligence of the railroad.—Id.

(D) Transportation and Delivery by Carrier.

⚷94(4) (U.S.C.C.A.La.) In an action against a railroad for conversion of cotton, in that the railroad delivered the cotton on a forged bill of lading, interest should be allowed the plaintiff only from judicial demand, and not from date of delivery of the cotton on the forged bill of lading; the conversion not being willful. —Hubbard Bros. & Co. v. Southern Pac. Co., 107.

(F) Loss of or Injury to Goods.

⚷132 (U.S.C.C.A.Tenn.) Where a carrier accepted for shipment burnt cotton that had been salvaged, and the bill of lading acknowledged the receipt of the shipment in apparent good order and free from fire, and there was evidence that it had been free from fire five days previous, there is a presumption that the failure of the carrier to deliver the cotton which burned during transit was due to its fault, and refusal to charge that before the shipper might recover he must show some evidence of negligence on part of the carrier, was proper.—Southern Ry. Co. v. Pettit, 613.

⚷134 (U.S.C.C.A.Tenn.) In an action for the value of burnt cotton, which was destroyed while in transit after it had been salvaged, testimony by witness of large experience in buying and selling burnt cotton as to its value, based on the market value of merchantable cotton, *held* competent and sufficient to support a verdict for damages, though the witness did not state the cost of reconditioning the cotton, on which his estimate of value had been based; that being matter for cross-examination.—Southern Ry. Co. v. Pettit, 613.

⚷136 (U.S.C.C.A.Tenn.) In an action against a railroad company for the value of burnt cotton, which was destroyed while in transit, the question whether the cotton was on fire at the time of the shipment, or whether it caught on fire while in transit, *held* one of fact for the jury.—Southern Ry. Co. v. Pettit, 613.

IV. CARRIAGE OF PASSENGERS.

(D) Personal Injuries.

⚷321(23) (U.S.C.C.A.Tenn.) In an action against a street railway for the wounding of a negro passenger in a shooting affair between the company's conductor and another negro passenger, instruction *held* not erroneous, in view of all the facts and circumstances, and a discussion between counsel, as telling the jury it was a proven or admitted fact that the conductor came into the car without reason and deliberately started a fight with the negro.—Memphis St. Ry. Co. v. Pierce, 609.

(E) Contributory Negligence of Person Injured.

⚷347(3) (U.S.C.C.A.Ohio) Whether an intending passenger, struck on railroad tracks while attempting to cross to board a train, was negligent, is a question for the jury, unless it is clear that reasonable minds can reach only the conclusion that a person of ordinary prudence would not have made the attempt under the circumstances—McLaughlin v. Pennsylvania Co., 529.

In an action for death of an intending passenger, struck by an express train which she thought was her train, and which she crossed the tracks to board, question of contributory negligence *held* for the jury under the evidence.—Id.

CEMETERIES.

See Charities, ⚷38; Perpetuities, ⚷4.

CERTIORARI.

See Criminal Law, ⚷1055.

CHAMPERTY AND MAINTENANCE.

⚷1 (U.S.C.C.A.N.Y.) In "maintenance" no personal profit is expected or stipulated, the motive being simply to aid a party, with money or otherwise, to prosecute or defend his suit; while in "champerty" there is a bargain with the plaintiff or defendant by which the champertor is to carry on the suit at his own expense, and is to derive some profit out of the thing sued for, if he prevails.—Sampliner v. Motion Picture Patents Co., 202.

⚷6(1) (U.S.C.C.A.N.Y.) A purchase by an attorney from his client of a right of action for tort, with intent to sue thereon, is champertous and void, and the purchaser cannot maintain an action on the assigned cause of action.—Sampliner v. Motion Picture Patents Co., 202.

CHANCERY.

See Equity.

CHARITIES.

See Perpetuities, ⚷4.

I. CREATION, EXISTENCE, AND VALIDITY.

⚷18 (U.S.C.C.A.Ill.) A charitable trust will not fail for want of a trustee, or inability of party named to act, but chancery will designate another trustee.—Laswell v. Hungate, 29.

⚷20(5) (U.S.C.C.A.Ill.) Even if a city cannot act as trustee of property devised for support of a school in the city, it may, as contemplated by the devise, designate the school to be supported.—Laswell v. Hungate, 29.

⚷23 (U.S.C.C.A.Ill.) A devise for support of a free school to be designated by a city is not invalid, on the theory that it leaves the city free to designate a school whose teachings are contrary to public policy, as not only must it be presumed that it will properly discharge its duty, but, if it should fail therein, the courts could lend their aid.—Laswell v. Hungate, 29.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

⚷36 (U.S.C.C.A.Ill.) Any of the so-called "free" schools of a city, established under the public school laws of the state, for which Const. Ill. art. 8, § 1, and Hurd's Rev. St. Ill. 1917, c. 122, § 127, call, satisfies a devise for support of "a school in said city the tuition of which school shall be free," "such free school as said [city] council shall see fit," though under section 115 tuition is required of nonresident pupils.—Laswell v. Hungate, 29.

⚷37 (U.S.C.C.A.Ill.) General charitable intent, making applicable the cy pres rule, were there no existing school to which the devise were applicable, *held* shown by devise for support of "a school" in a city, "the tuition of which shall be free," such free school as said [city] council shall see fit," with declaration, "I have made the gift for the benefit of the young * * * and do not wish them to lose the benefit of the gift by the neglect of others." —Laswell v. Hungate, 29.

⚷38 (U.S.C.C.A.Ill.) Mere request, in will making devise for support of a school in a city, that the city keep testator's family burial lot in repair, imposes no obligation, much less creates a perpetuity, and so does not affect validity of charitable gift.—Laswell v. Hungate, 29.

CHATTEL MORTGAGES.

See Bankruptcy, ⚷163; Internal Revenue, ⚷42.

CITIZENS.

See Army and Navy, ⚷20.

CLERKS OF COURTS.

See Deposits in Court, ⚷11.

COLLISION.

See Admiralty, ⚷124; Shipping, ⚷204, 207, 209; Towage, ⚷11.

I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

⚷9 (U.S.C.C.A.N.Y.) New York City Charter, § 879, providing that no vessels shall lie at the end of piers, "except at their own risk of injury from vessels entering or leaving any adjacent dock," while not binding on courts of admiralty to the extent of absolutely preventing recovery, is recognized by them as establishing a valid harbor rule.—The New York Central No. 18, 445.

A violation by a vessel of the New York harbor rule against lying at the end of a pier can be invoked only by vessels entering or leaving an adjacent slip, the risk of injury from which under the statute such vessel assumes, and they are not exempted from the duty to exercise proper care.—Id.

III. STEAM VESSELS MEETING OR CROSSING.

⚷39 (U.S.C.C.A.Va.) Decree, holding one of two meeting steamships solely in fault for a collision for crossing and failing to comply with the proper signal of the other for passing port to port, affirmed.—The Powhatan, 192.

VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

⚷72(2) (U.S.C.C.A.N.Y.) A collision between a tug moving out of a slip and a scow held by her towing tug at the end of an adjacent pier *held* due to faults of all three vessels.—The New York Central No. 18, 445.

⚷73 (U.S.C.C.A.N.Y.) New York City Charter, § 879, providing that no vessels shall lie at the end of piers, "except at their own risk of injury from vessels entering or leaving any adjacent dock," while not binding on courts of admiralty to the extent of absolutely preventing recovery, is recognized by them as establishing a valid harbor rule, a violation of which is evidence of negligence, and casts on the violator the burden of showing affirmatively that the violation did not contribute to its injury.—The New York Central No. 18, 445.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

⚷104 (U.S.C.C.A.Va.) A tug leaving the port of Norfolk, with a tow exceeding by 300 feet the length prescribed by the harbor regulations, *held* to have the burden of showing that such violation did not cause or contribute to a collision in Elizabeth river between the tow and another vessel.—New York, P. & N. R. Co. v. Wilkins, 254.

XII. SUITS FOR DAMAGES.

(D) Damages.

⚷130 (U.S.C.C.A.Mass.) Awarding a vessel injured by collision interest on damages for loss of property from date of collision on sums paid for repairs from dates of payment, and on demurrage from time when damages were liquidated, is within court's discretion.—Eastern S. S. Corporation v. Great Lakes Dredge & Dock Co., 3.

COMMERCE.

See Carriers, ⚷25, 32; Navigable Waters, ⚷1, 3, 22.

I. POWER TO REGULATE IN GENERAL.

⚷8(6) (U.S.C.C.A.Ill.) Inasmuch as Congress has created the liability for damages for injuries or death resulting from violation of the Safety Appliance Act (Comp. St. §§ 8605, 8613, 8617), no state Legislature can alter or impair the federal right by passing compensation acts.—Ross v. Schooley, 374.

II. SUBJECTS OF REGULATION.

⚷27(5) (U.S.C.C.A.Ill.) Inasmuch as Congress has created the liability for damages for in-

juries or death resulting from violation of the Safety Appliance Act (Comp. St. §§ 8605, 8613, 8617), no state Legislature can alter or impair the federal right by passing compensation acts, and an injured employé is entitled to recover under the Safety Appliance Act, although at the moment of the injury he was not engaged in interstate commerce; the congressional power called into play being the power to prescribe the equipment of interstate carriers for protection of all persons upon such roads, regardless of their participation in interstate commerce.—Ross v. Schooley, 374.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSIONERS.

See Drains, ⚷49.

COMMON LAW.

See Banks and Banking, ⚷253, 254; Criminal Law, ⚷108; Marriage, ⚷50; Sales, ⚷464; Trade-Marks and Trade-Names, ⚷45.

COMPOSITIONS WITH CREDITORS.

See Bankruptcy, ⚷387; Courts, ⚷264.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, ⚷464–484.

CONFUSION OF GOODS.

See Warehousemen, ⚷20.

CONSCRIPTION ACT.

See Army and Navy, ⚷20, 40; Conspiracy, ⚷28, 45, 47; Criminal Law, ⚷97, 371, 406, 450, 723, 814, 822, 1170; Habeas Corpus, ⚷16; Perjury, ⚷9, 19; War, ⚷4.

CONSPIRACY.

See Bribery, ⚷11; Criminal Law, ⚷108, 424, 673, 814, 822, 877, 1169, 1170, 1186; Indictment and Information, ⚷87, 125; Poisons, ⚷9.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

⚷27 (U.S.C.C.A.Tex.) An overt act is not necessary for convi-tion, under Penal Code, § 6 (Comp. St. § 10170), of conspiracy to destroy or overthrow the government, or to wage war against the United States.—Bryant v. U. S., 418.

⚷28 (U.S.C.C.A.N.Y.) A conspiracy to violate Code of Law D. C. §§ 869a, 869b, enacted by Congress March 1, 1909, is a conspiracy to commit an offense against the United States, within Criminal Code, § 37 (Comp. St. § 10201).—Easterday v. McCarthy, 45.

⚷28 (U.S.C.C.A.Tex.) A conspiracy against enforcement of the Draft Law, entered into before its passage, continuing up to and after the time it became effective, then became illegal, even if it was not before.—Bryant v. U. S., 418.

Though the specific object of the conspirators was to prevent enforcement of the Draft Law, if to attain that object an attempt was to be made, if necessary, to supplant the administration with a provisional government, the conspiracy was to destroy or overthrow the government, in violation of Penal Code, § 6 (Comp. St. § 10170).—Id.

It is a conspiracy to commit treason by levying war against the United States, to conspire to prevent altogether the enforcement of a statute thereof.—Id.

⚷34 (U.S.C.C.A.Wash.) In view of Const. art. 1, § 7, a joint resolution of Congress made and approved on April 6, 1917, declaring a state of war to exist between the United States and Germany, is a "law," within the scope of Criminal Code, § 6 (Comp. St. § 10170), denouncing the offense of conspiracy to oppose by force the authority of the United States, or by force to hinder and delay the execution of any law thereof.—Wells v. U. S., 555.

(B) Prosecution and Punishment.

⚷43(11) (U. S. C. C. A. Wash.) An indictment charging that defendants, in violation of Criminal Code, § 6 (Comp. St. § 10170), conspired together to oppose by force the authority of the United States, and by force to prevent, hinder, and delay the execution of the joint resolution of Congress of April 6, 1917, declaring a state of war to exist with Germany, which in the second count specifically enumerated various acts, the execution of which defendants conspired to prevent, hinder, and delay, *held* to state with sufficient definiteness the manner in which the offense was to be committed.—Wells v. U. S., 555.

⚷43(12) (U.S.C.C.A.Tex.) It is only necessary to show conspiracy between two or more of all those charged with conspiracy to warrant conviction of those shown to have conspired.—Bryant v. U. S., 418.

Though indictment under Penal Code, § 6 (Comp. St. § 10170), charges conspiracy to overthrow and destroy the government and to wage war against the United States, it is enough to establish either.—Id.

⚷45 (U. S. C. C. A. Wash.) Where defendants were charged with conspiring in violation of Criminal Code, § 6 (Comp. St. § 10170), to prevent, hinder, and delay the execution by force of the joint resolution declaring a state of war to exist with Germany, etc., by issuing circulars against conscription, the admission of a resolution introduced by one of the defendants at a meeting where organized workers demanded of the government exemption from military service of those who had conscientious objections to the war was proper, having a tendency at least to show defendant's attitude of mind toward conscription.—Wells v. U. S., 555.

Where defendants were charged with violation

of Criminal Code, § 6 (Comp. St. § 10170), for conspiring by force to hinder, delay, and obstruct the execution of the joint resolution declaring a state of war with Germany, etc., evidence that one of the circulars they issued was found on the front porch of the witness' home, which was within a block of the boundary lines of the military reservation, *held* admissible to show distribution of the circulars.—Id.

Where defendants were charged with violating Criminal Code, § 6 (Comp. St. § 10170), for conspiring by force to obstruct, hinder, and delay the joint resolution declaring a state of war to exist with Germany, and the prosecution relied on circulars advocating resistance to conscription, a letter written in reply to one written by defendant by a congressman, showing that he was opposed to conscription and offered to show defendants' good faith, was incompetent.—Id.

⚷47 (U.S.C.C.A.Mo.) Evidence *held* insufficient to sustain a conviction of one of two defendants jointly indicted for conspiracy to bribe a post office clerk, but sufficient to sustain the conviction of his codefendant of the former offense.—Kirkwood v. U. S., 171.

⚷47 (U.S.C.C.A.Tex.) Relative to necessity of resistance of a law being general, that a conspiracy to resist it shall constitute one to destroy or overthrow the government, or to wage war against the United States, evidence *held* sufficient to show conspiracy of defendants to prevent enforcement of conscription under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k) all over the United States, not alone in their individual cases.—Bryant v. U. S., 418.

⚷48 (U.S.C.C.A.N.Y.) Though the union of the minds of at least two persons is a prerequisite to the commission of the crime of conspiracy, yet one may be convicted after the other accused is dead before conviction; but, if one be acquitted, the other also must be acquitted, as is the case if the prosecutor enter a nolle prosequi as to one.—Feder v. U. S., 644.

⚷48 (U.S.C.C.A.Tex.) In prosecutions of physicians for having conspired to violate the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), and having made sales illegally, question whether or not each defendant had conspired with a druggist, a codefendant, to dispense the drug in the guise of prescriptions to patients, but really to addicts for the gratification of their appetite, and not for their cure, *held* for the jury under the evidence.—Melanson v. U. S., 129.

⚷48 (U.S.C.C.A.Tex.) Evidence *held* sufficient to make it a jury question whether defendants conspired to overthrow and destroy the government and to levy war against the United States.—Bryant v. United States, 418.

⚷48 (U.S.C.C.A.Wash.) In view of National Defense Act, §§ 57, 79 (Comp. St. §§ 3041, 3044q), as well as Act Jan. 21, 1903, as amended by Act May 27, 1908, *held*, in a prosecution wherein defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), by force to prevent, hinder, and delay the execution of the joint resolution of Congress declaring a state of war to exist with Germany, etc., that the evidence was sufficient to take the case to the jury.—Wells v. U. S., 555.

CONSTITUTIONAL LAW.

For validity of statutes relating to particular subjects, see also the various specific topics.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

⚷46(3) (U.S.C.C.A.Alaska) The statute on which an indictment is found is determinable as a matter of law from the facts charged, although the statute is not mentioned and indictment is brought under another statute, and where the facts alleged in the indictment charging the making of false affidavits as to annual assessment work on a placer claim brought the case within Comp. Laws Alaska 1913, § 162, it was immaterial whether Sess. Laws Alaska 1915, c. 10, violation of which was charged, was constitutional.—Vedin v. U. S., 534.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

⚷62 (U.S.C.C.A.Tex.) Rev. Civ. St. Tex. 1911, art. 5275, authorizing the Governor, on application therefor, to cede exclusive jurisdiction to the United States over lands described in the application and acquired by the United States for certain specified purposes, operates as a blanket consent by the Legislature to such cession, leaving to the Governor only the power to determine when the specified conditions exist, and is not a delegation to him of legislative power.—Brown v. U. S., 258.

XI. DUE PROCESS OF LAW.

⚷307 (U.S.C.C.A.Fla.) Act March 4, 1915, § 4 (Comp. St. § 8322), empowering seamen to collect half their wages at American ports of call, does not unconstitutionally deprive a foreign vessel of contract rights without due process, because it renders unenforceable in American ports a wage contract lawfully entered into abroad.—The Strathearn, 25.

CONTINUANCE.

See Appeal and Error, ⚷684, 966.

⚷7 (U.S.C.C.A.Canal Zone) Both under Panama law and general principles, motion for continuance is addressed to discretion of trial court.—Panama R. Co. v. Pigott, 183.

⚷26(4) (U.S.C.C.A.Alaska) In a railroad servant's action for injuries, denial of the road's motion for continuance to enable it to secure the testimony of a witness, whom a counter affidavit showed to be an employé of defendant company, *held* within the discretion of the court, under Comp. Laws Alaska 1913, § 1001, in view of showing as to diligence.—Alaska Anthracite R. Co. v. Moller, 515.

CONTRACTS.

See Assignments; Bailment, ⚷14; Bills and Notes; Brokers, ⚷54; Champerty and Maintenance; Courts, ⚷372; Covenants;

Customs and Usages, ⚷12; Damages, ⚷23; Drains, ⚷49; Equity, ⚷105; Estoppel, ⚷68; Evidence, ⚷96; Frauds, Statute of; Guaranty; Maritime Liens, ⚷25; Marriage, ⚷40, 50; Parties, ⚷19; Patents, ⚷157; Pleading, ⚷248; Principal and Surety, ⚷123, 145, 162; Public Lands, ⚷120; Sales; Seamen, ⚷15; Stipulations; United States, ⚷67; Vendor and Purchaser.

I. REQUISITES AND VALIDITY.

(F) Legality of Object and of Consideration.

⚷101(1) (U.S.C.C.A.Fla.) A contract may be valid and enforceable where executed, but unenforceable in another jurisdiction.—The Strathearn, 25.

⚷108(1) (U. S. C. C. A. N. Y.) The question whether a contract is void, as contrary to public policy, is to be determined by its general tendency, and if that is opposed to the interests of the public the contract is void, even though in the particular case the intent of the parties may have been good, and no injury to the public may have resulted.—Sampliner v. Motion Picture Patents Co., 202.

⚷116(1) (U.S.C.C.A.Ohio) A manufacturer of underwear, which sold only to selected jobbers, could not restrain a jobber, unable to buy directly from it, and who bought from others, from removing certain secret marks on the bottom of each carton of goods, where one of the purposes of the manufacturer in so marking the cartons was to enable it to determine which of its wholesalers cut prices, so that such wholesalers might be stricken from the selected list of jobbers, an unlawful restraint of trade which equity will not aid.—B. V. D. Co. v. Isaac, 659.

IV. RESCISSION AND ABANDONMENT.

⚷267 (U.S.C.C.A.Mo.) The right to repudiate a contract for the default of the other party thereto cannot be exercised by a party who is himself in unexcused default of performance of an essential covenant thereof.—White Oak Fuel Co. v. Carter, 266.

CORPORATIONS.

See Bankruptcy, ⚷143, 163, 326, 345; Carriers; Evidence, ⚷487, 543; Pleading, ⚷34; Railroads; Street Railroads; Taxation, ⚷168.

V. MEMBERS AND STOCKHOLDERS.

(D) Liability for Corporate Debts and Acts.

⚷218 (U.S.C.C.A.S.D.) A guaranty of renewal notes of a corporation, of which the guarantor was a stockholder and also a creditor in a substantial amount, by which an extension of the debt was secured, *held* supported by a valuable consideration.—International Harvester Co. of America v. Patterson, 451.

⚷228 (U.S.C.C.A.Pa.) Capital stock issued as full paid by a Delaware corporation on a contract for purchase of real estate, which was never carried out by full payment or conveyance of the property, was not issued on a conditional subscription, and was not only not full paid, but wholly without consideration, and assessable in the hands of the holder under the law of Delaware for the benefit of creditors.—Wallace v. Weinstein, 575.

⚷232(3) (U.S.C.C.A.Pa.) Under the law of Delaware, a corporation cannot lawfully capitalize prospective profits.—Wallace v. Weinstein, 575.

VI. OFFICERS AND AGENTS.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

⚷316(1) (U.S.C.C.A.Wash.) An insolvent corporation, in need of funds and ready cash, may borrow the amount needed from a director or other officer of the corporation, and secure it by lien on its property or transfer of its assets.—In re Lake Chelan Land Co., 501.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

⚷376 (U.S.C.C.A.Iowa) In the absence of statutory or charter restriction, a corporation has inherent power to purchase its own stock.—First Trust Co. v. Illinois Cent. R. Co., 176.

(E) Torts.

⚷491 (U.S.C.C.A.Canal Zone) A corporation cannot escape liability for negligent conduct of a business in which it engages, by showing that it was not authorized to carry on that business.—Panama R. Co. v. Curran, 114.

VIII. INSOLVENCY AND RECEIVERS.

⚷542(1) (U.S.C.C.A.Iowa) Where a purchase of its own stock by a corporation is made when it is insolvent, or if such transaction renders it insolvent, such purchase is voidable as to existing creditors, and as to subsequent creditors who became such without notice and in reliance on its former solvency, and if notes or bonds are given in exchange for the stock, they will be subordinate to the claims of such creditors; but not to claims of subsequent creditors with notice.—First Trust Co. v. Illinois Cent. R. Co., 176.

X. CONSOLIDATION.

⚷586 (U.S.C.C.A.Mich.) Holding company, which acquired control of gas company through ownership of stock and bonds, *held* not to have in effect supplanted the gas company, assumed its obligations, and become the owner of all its rights and property, despite the use made by the holding company of its power to select directors for the gas company, and also certain statements made by the holding company in its prospectus, reports, etc., to its own stockholders.—City of Holland v. Holland City Gas Co., 629.

⚷590(1) (U.S.C.C.A.Mich.) Where one corporation acquires a controlling interest in the stock of another, and so secures opportunity alike to benefit or to injure the interests of such other company and its customers, it being engaged in the public business of supplying gas to a community, courts will not hesitate to look into such a situation, the control-

led company having become bankrupt, and to grant merited relief against the holding company.—City of Holland v. Holland City Gas Co., 629.

XII. FOREIGN CORPORATIONS.

⚷640 (U.S.C.C.A.Ill.) Rev. Codes Mont. § 3850, relating to the filing of reports and affidavits by corporations, was not intended to, and does not, apply to foreign corporations.—Stark Bros.' Nurseries & Orchards Co. v. Little, 461.

If Rev. Codes Mont. § 3850, making directors of corporations liable for debts, if they do not file certain reports, applied to foreign corporations, the "debt or judgment" specified therein must be limited to a debt incurred in Montana or a judgment based thereon; a state being without power to make nonresident directors of a corporation of another state liable upon a debt incurred in still another state to another foreign corporation.—Id.

COSTS.

See Admiralty, ⚷124; Appeal and Error, ⚷709; Principal and Surety, ⚷185.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

⚷2 (U.S.C.C.A.La.) Taxable costs are made so either by statute, rule of court, or order of court in a specific case, or by established usage, equivalent of a rule.—Parkerson v. Borst, 173.

⚷70 (U.S.C.C.A.La.) Until final judgment, incidence of costs is not determinable, and any attempt to adjudicate correctness of items at the instance of one party might be futile, and hence the court need not adjudicate the correctness of items prior to final judgment.—Parkerson v. Borst, 173.

IV. SECURITY FOR PAYMENT.

⚷108 (U.S.C.C.A.Canal Zone) The executive order of August 14, 1914, relating to the Canal Zone, that plaintiff in any suit may be required to give security for costs, does not require such security whenever moved for by defendant, but confers on the court discretion to exercise the power, and his denial of a motion to compel a resident plaintiff to give security will not be reversed, where the record does not contain the evidence on the hearing of the motion.—Panama R. Co. v. Curran, 114.

V. AMOUNT, RATE, AND ITEMS.

⚷164(1) (U.S.C.C.A.Va.) The losing party in a litigation cannot be charged with the expenses of his adversary beyond taxable costs which may be adjudged against him.—Leary v. U. S., 330.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

⚷251 (U.S.C.C.A.La.) There being no statute, rule of court, order of court, or established usage requiring it, a district judge did not err in disallowing a premium paid for an appeal bond to be taxed as costs.—Parkerson v. Borst, 173.

COTTON FUTURES ACT.

See Brokers, ⚷85; Frauds, Statute of, ⚷115, 116.

COUNTIES.

See Evidence, ⚷342.

COURT RULES CITED.

Equity Rule 22.—168.
Equity Rule 39.—281.

COURTS.

See Appeal and Error, ⚷330, 719, 750, 758, 1003; Bankruptcy, ⚷230, 293, 391; Costs, ⚷2, 251; Criminal Law, ⚷97, 304, 1048, 1129; Deposits in Court; Evidence, ⚷332; Exceptions, Bill of, ⚷36; Indictment and Information, ⚷86; Judges; Railroads, ⚷346; Sales, ⚷464; Waters and Water Courses, ⚷33.

VII. UNITED STATES COURTS.

(A) Jurisdiction and Powers in General.

⚷264(1) (U.S.C.C.A.N.Y.) If a federal court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit, without regard to the citizenship of the parties, the amount in controversy, or any other factor that would ordinarily determine jurisdiction.—Pell v. McCabe, 18.

⚷264(4) (U.S.C.C.A.N.Y.) An ancillary suit may be maintained, inter alia, to prevent the relitigation in other courts of the issues heard and adjudged by that court in the original suit, and to protect the titles and rights acquired under its judgment or decree from attack based on the theory that the adjudication in the original suit was illegal or ineffective.—Pell v. McCabe, 18.

An order confirming a composition by a bankrupt partnership, which provided that creditors who assented should be deemed to have released a third person, not adjudicated a bankrupt, and whose relation to the firm was not determined, from liability on any claim against the bankrupts, was not an adjudication that such third person was not liable for such claims, and a suit to enjoin an action against him, based on fraud and charging him as a partner, brought in another jurisdiction by persons who filed no claim and did not assent to the composition, is not ancillary to the bankruptcy proceeding.—Id.

⚷276 (U.S.C.C.A.N.Y.) Where a preliminary motion raising the question of jurisdiction was denied, an answer, specifically reserving the objections previously made to the court's jurisdiction, does not waive the objection to the venue.—Stryker Deflector Co. v. Perrin Mfg. Co., 50.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

⚷292 (U.S.C.C.A.Mo.) A federal court has no jurisdiction of suit for unfair competition alone, in the absence of diversity of citizenship, and so in a suit, jurisdiction of which depends solely on it being for infringement of registered trade-mark, recovery can be had for

only such unfair competition as is a part of the same transaction as the infringement; that is, that subsequent to notice of infringement, necessary under Trade-Mark Act, § 28 (Comp. St. § 9514) for recovery for infringement, where notice of registration is not given on the mark. —Stark v. Stark Bros. Nurseries & Orchards Co., 221.

⚷297 (U.S.C.C.A.N.Y.) The Circuit Court of Appeals has no jurisdiction of a suit by one railroad company against another and the collector of internal revenue, to determine a liability for the income tax on certain dividends as between the two companies, where the controversy depends wholly on the construction of the lease executed by plaintiff railroad to defendant; both being citizens of the state of New York, whose courts may determine the controversy, unless the collector should remove the case under Judicial Code, § 33 (Comp. St. § 1015).—Rensselaer & S. R. Co. v. Delaware & Hudson Co., 539.

(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

⚷310 (U.S.C.C.A.Pa.) Bill by one of two co-owners and lessors of a graphite mine for non-payment of rent, breach of covenant for good mining, and removal of the property of the lessors, was properly dismissed, where brought by one lessor only, though the joinder of the other would oust the jurisdiction of the court as to the parties before it, despite equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix).—Himes v. Schmehl, 281.

⚷312(1) (U.S.C.C.A.Okl.) Under the law of Oklahoma an oil and gas lease of the ordinary kind gives the lessee a present vested interest in the premises, and a suit by his assignee to protect his rights thereunder is not one on a "chose in action," within Judicial Code, § 24 (Comp. St. § 991), in which he must show diversity of citizenship between his assignor and defendants to give a federal court jurisdiction. —Aggers v. Shaffer, 42.

(E) Procedure, and Adoption of Practice of State Courts.

⚷335(1) (U.S.C.C.A.Ariz.) The federal courts, in the exercise of their equity jurisdiction, are not bound by Civ. Code Ariz. 1913, par. 4939, forbidding injunction against the state or any officer to prevent the collection of a tax levied under provisions of law.—Standard Oil Co. v. Howe, 485.

⚷337 (U.S.C.C.A.Tex.) The federal courts in criminal procedure do not follow the practice of the courts of the states in which they sit.—Myres v. U. S., 125.

Provision of Rev. St. § 906 (Comp. St. § 1520), authorizing use in federal courts of authenticated documents from state courts and offices. that they shall have such faith and credit given them as they have by law or custom in the courts or offices of the state, is not an adoption of the rules of practice, under the state's law, as to the preliminaries necessary for their introduction, as length of time of filing before trial and notice to adverse party.—Id.

⚷337 (U.S.C.C.A.Tex.) Federal courts do not follow practice of the courts of the states in which they sit, in criminal matters, and need not permit argument to follow charge in conformity to state practice.—Bryant v. U. S., 418.

(F) State Laws as Rules of Decision.

⚷372(1) (U.S.C.C.A.Ill.) A federal court need not follow a decision of the Supreme Court of Illinois as to the navigability of the Desplaines river.—Economy Light & Power Co. v. U. S., 138.

⚷372(4) (U.S.C.C.A.Okl.) A decision by the highest court of a state, not based on any statute, that a contract is void as against the public policy of the state, is not binding on a federal court in a case involving a similar contract, made before such decision was rendered, and where the contract is valid under the settled law of the national courts.—Interstate Compress Co. v. Agnew, 199.

(H) Circuit Courts of Appeals.

⚷405(5) (U.S.C.C.A.Ark.) Where the jurisdiction of a District Court depended upon whether a paragraph of the complaint stated a cause of action for special damages claimed therein, without which the amount involved was below the jurisdictional limit, a writ of error to review a judgment sustaining a demurrer to such paragraph and dismissing the action was properly taken to the Circuit Court of Appeals.—Stebbins v. Selig, 314.

COVENANTS.

I. REQUISITES AND VALIDITY.

(A) Express Covenants.

⚷2 (U.S.C.C.A.Tex.) There is nothing to prevent a person from warranting title to land that he neither owns nor claims, and the grantee had a right to stand on the terms of his deed.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

IV. ACTIONS FOR BREACH.

⚷121(3) (U.S.C.C.A.N.D.) A decree in a suit by a grantee of land by an unrecorded deed against his grantor and a subsequent mortgagee of the grantor and an assignee of the mortgage, holding the mortgage void and canceling the same, *held* conclusive as to the invalidity of the mortgage as between mortgagee and assignee in an action by the latter to recover over on a warranty in the assignment.—Caldwell v. Blodgett, 90.

CRIMINAL LAW.

See Army and Navy, ⚷20, 40; Banks and Banking, ⚷256, 257; Bribery; Conspiracy, ⚷27-48; Courts, ⚷337; District of Columbia, ⚷4; Homicide; Indians, ⚷38; Indictment and Information; Intoxicating Liquors; Neutrality Laws, ⚷5; Perjury; Poisons, ⚷9; Prostitution; War, ⚷4; Witnesses, ⚷259.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

⚷37 (U.S.C.C.A.Ill.) The fact that soldiers who purchased liquor were military police, who made the purchases to procure evidence, does

not estop the government from prosecuting the seller, where no deception was practiced upon him, though the soldiers claimed to want the liquor for sickness.—Goldstein v. U. S., 159.

The mere use by the government of decoys or detectives does not raise the issue of estoppel to prosecute, but there must be deception of such character as to make it unconscionable for the government to press its case.—Id.

IV. JURISDICTION.

⚷97(1) (U.S.C.C.A.Cal.) The United States District Court in California had jurisdiction to try a prosecution for having unlawfully, improperly, and fraudulently endeavored to obtain allowance of an application for exemption and discharge from the selective service draft on the ground defendant had a wife dependent on his labor for support, where the indictment alleged that the affidavit involved was prepared and sworn to in California, though it charged that defendant registered in the state of Washington.—Hardwick v. U. S., 509.

V. VENUE.

(A) Place of Bringing Prosecution.

⚷108(1) (U.S.C.C.A.N.Y.) The venue of conspiracy may be laid wherever an overt act is committed, under Criminal Code, § 37 (Comp. St. § 10201), making the commission of an overt act necessary to the offense, as well as at common law, though some of the indicted defendants were never in that district.—Easterday v. McCarthy, 45.

⚷113 (U.S.C.C.A.Tex.) Judicial Code, § 40 (Comp. St. § 1022), providing that capital cases shall be tried in the county where the offense was committed, "where that can be done without great inconvenience," does not give a defendant an absolute right to trial in such county, but the matter rests in the discretion of the court.—Brown v. U. S., 258.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

⚷242(1) (U.S.C.C.A.Tex.) Judicial Code, § 40 (Comp. St. § 1022), providing that capital cases shall be tried in the county where the offense was committed, where that can be done without great inconvenience, does not contemplate a transfer of the cause to another court, but a trial by the same court in the county where the offense was committed, and the court where the indictment was found does not lose jurisdiction by ordering such a transfer for trial.—Brown v. U. S., 258.

⚷242(2) (U.S.C.C.A.N.Y.) Rev. St. § 1014 (Comp. St. § 1674), authorizing the removal of persons indicted for offenses to the district where trial is to be held, authorizes removal to the District of Columbia.—Easterday v. McCarthy, 45.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

⚷262 (U.S.C.C.A.Nev.) In view of U. S. Comp. St. § 1698, defendant waived arraignment where, after the indictment was read to the jury, the clerk stated defendant had entered a plea of not guilty, and defendant proceeded to trial without objection, the date of which had been fixed by stipulation.—Shidler v. U. S., 570.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

⚷304(1) (U.S.C.C.A.Tex.) The courts take judicial notice of the facts of chemistry contained in the United States Pharmacopœia.—Melanson v. U. S., 129.

⚷304(2) (U.S.C.C.A.Wash.) Courts take judicial notice of the commencement and existence of the war between the United States and Germany, and of the further fact that it has been conducted in conjunction with the United Kingdoms of Great Britain and Ireland and the Dominion of Canada, among other nations, and that to promote the success of Germany is to promote the success of an enemy of the United States.—Mead v. U. S., 589.

⚷304(6) (U.S.C.C.A.Ill.) Where there was evidence that an offense was committed in Rockford, Ill., the court could take judicial notice that it was within the Northern district, Western division, of Illinois, so that the venue was established.—Goldstein v. U. S., 159.

⚷304(14) (U.S.C.C.A.Tex.) Where an indictment in a federal court sufficiently described the place where the offense was committed, the court will take judicial notice of facts which vest the United States with exclusive jurisdiction over such place.—Brown v. U. S., 258.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

⚷338(3) (U.S.C.C.A.Iowa) That a defendant could not read or write English did not render letters purporting to have been written by him inadmissible, under instruction that they should be considered only if the jury found that they were written at the direction of and for defendant.—Nokis v. U. S., 453.

(C) Other Offenses and Character of Accused.

⚷369(1) (U.S.C.C.A.Ohio) In a prosecution under Rev. St. 5209 (Comp. St. § 9772), against the president and another officer of a bank for misapplying its funds and making false entries in the books in connection with loans and advances to a company which became insolvent, evidence of similar transactions occurring two or three years before those set forth in the indictment is admissible, over the objection of remoteness.—Galbreath v. U. S., 598.

⚷369(1) (U.S.C.C.A.S.C.) On trial of a defendant for violation of the Espionage Act (Comp. St. 1918, §§ 10212a–10212h), by making false reports and doing other acts with intent to interfere with the prosecution of the war, it was prejudicial error to admit evidence of threats made by him against the President, not connected with the acts with which he was charged.—Hall v. U. S., 94.

⚷369(2) (U.S.C.C.A.Tex.) Facts material to show the offense in issue are not incompetent, because tending to prove an independent crime.—Bryant v. U. S., 418.

⚷371(1) (U.S.C.C.A.Nev.) In a prosecution under Espionage Act June 15, 1917, § 3 (Comp.

St. 1918, § 10212c), for making false statements with the intention of promoting the success of Germany, with which the United States was at war, evidence of statements made by defendant prior to the declaration of war was admissible, where limited to the question of the defendant's state of mind at the time he uttered the statements charged.—Shidler v. U. S., 570.

⚷371(1) (U.S.C.C.A.Porto Rico) In a prosecution under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), where the intent of the defendant by publication to commit the offense of causing or attempting to cause insubordination, etc., was one of the issues submitted to the jury, publications of the defendant in earlier issues of his paper were admissible in evidence to show that defendant had no unlawful intent.—Balbas v. U. S., 229.

⚷371(1) (U.S.C.C.A.R.I.) In prosecution for violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), by inciting insubordination in the military service and obstructing recruiting, circulars distributed by defendant before passage of act, urging that persons to whose hands they might come should fail to register under the Draft Act, etc., also prior statements in regard to conscription made by defendant, *held* admissible to show intent with which defendant made statements on which his prosecution was based, though he had been indicted for the offense of distributing the circulars.—Coldwell v. U. S., 151.

⚷371(1) (U.S.C.C.A.Tex.) In prosecution of a physician for violating the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), order forms used by defendant to procure morphine from a druggist, other than the one with whom he was charged with having conspired and with having made a sale, were admissible on the issue of intent to furnish the drug to an addict, and not to aid or cure a patient in his practice as a physician.—Melanson v. U. S., 129.

⚷371(1) (U.S.C.C.A.Wash.) In a prosecution for violation of the Selective Service Law (Comp. St. 1918, §§ 2044a–2044k), where defendant testified that he acted in good faith in registering at a place other than his alleged permanent home, a leaflet advocating resistance to conscription was admissible, where there was evidence to show that defendant was one of those directly responsible for its publication.—Pass v. U. S., 77.

⚷377 (U.S.C.C.A.Tex.) Proof of good character of defendants as to being law-abiding citizens may be limited to the date of the alleged commission of the offense.—Bryant v. U. S., 418.

(D) Materiality and Competency in General.

⚷393(1) (U.S.C.C.A.Tex.) The constitutional guaranty against compelling defendants to be witnesses against themselves does not go to the extent of preventing the government from proving by secondary evidence the contents of a document it cannot produce, because in a defendant's possession.—Bryant v. U. S., 418.

(E) Best and Secondary and Demonstrative Evidence.

⚷400(8) (U.S.C.C.A.Ohio) In a prosecution against officers of a national bank, who were charged with making false entries, etc., an expert accountant may testify as to summaries which he made of the contents of such books, in connection with loans to a company which became bankrupt and whose books were lost; the fact that the accountant reversed certain items in making his summary not rendering the testimony inadmissible, where the changes were explained to him by the jury.—Galbreath v. U. S., 598.

⚷402(1) (U.S.C.C.A.Ohio) In a prosecution against the president and another officer of a bank for misapplication of funds and the making of false entries in the books in connection with loans and advances to a corporation which became bankrupt, testimony by an expert accountant, who had examined the books and records of the company which became a bankrupt, and had made summaries thereof, *held* admissible, on proof of loss of such books and records.—Galbreath v. U. S., 598.

⚷402(2) (U.S.C.C.A.Tex.) Tracing letters into defendant's possession authorizes the government to introduce secondary evidence of their contents, without a demand for their production, especially where defendants testify to their destruction.—Bryant v. U. S., 418.

(F) Admissions, Declarations, and Hearsay.

⚷406(2) (U.S.C.C.A.Wash.) In a prosecution for having violated the Selective Service Law (Comp. St. 1918, §§ 2044a–2044k), testimony of a secret service agent as to admissions made by defendant after his arrest *held* admissible; there being no evidence of any substantial character tending to show force or threats against defendant or inducement offered him by government agents.—Pass v. U. S., 77.

(G) Acts and Declarations of Conspirators and Codefendants.

⚷423(4) (U.S.C.C.A.Okl.) Where a conspiracy has been shown, the act of one conspirator in furtherance of the common purpose is admissible in evidence against all; and this is so, though the conspirator committing the act was not a defendant in the case being tried.—Isenhouer v. U. S., 188.

⚷424(1) (U.S.C.C.A.N.Y.) In a prosecution of two defendants for conspiracy to defraud the United States, testimony of statements or admissions by one defendant, made to a representative of the Department of Justice after the conspiracy, if it had existed, had ended in failure, *held* inadmissible against the other defendant.—Feder v. U. S., 644.

(I) Opinion Evidence.

⚷450 (U.S.C.C.A.Mo.) On trial of an indictment charging an offer to bribe members of a draft board to exempt a person from service, the understanding of such members as to whether the words used by defendant constituted an offer *held* properly excluded as incompetent; this being the very matter in issue.—August v. U. S., 428.

⚷472 (U.S.C.C.A.Tex.) In prosecution of physicians for violating the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), the testimony of qualified medical experts that the prescribing of the drug under stated quantities and cir-

cumstances would not be in the course of a physician's regular practice was admissible, on the issue whether the drug was dispensed in the legitimate course of defendants' practice as physicians.—Melanson v. U. S., 129.

(K) Confessions.

⚷535(1) (U.S.C.C.A.Okl.) A conviction on statements of the defendant will not be sustained without corroborative proof of the corpus delicti.—Goff v. U. S., 378.

(M) Weight and Sufficiency.

⚷563 (U.S.C.C.A.Okl.) Evidence *held* insufficient to sustain a conviction where, aside from statements made by defendant before his arrest, it was as consistent with the commission of a different offense as with that of the crime charged.—Goff v. U. S., 378.

XII. TRIAL.

(C) Reception of Evidence.

⚷673(4) (U.S.C.C.A.N.Y.) In a prosecution for conspiracy to defraud the United States, where testimony was admitted of the statements or admissions of one defendant, made to a representative of the Department of Justice after the conspiracy had ended in failure, it was prejudicial error to refuse to instruct that such statements, made out of court, were not competent as against the other defendant.—Feder v. U. S., 644.

⚷683(1) (U.S.C.C.A.S.D.) In a prosecution for violating Espionage Act, tit. 1, § 3 (Comp. St. 1918, § 10212c), by attempting to cause disloyalty in the military forces and by obstructing recruiting, a letter from defendant to the president of the German-American Alliance of his state, inclosing a newspaper clipping telling of the escape of a German soldier, who told of the brutality of German officers, conditions behind the German lines, etc., with defendant's comment, "What kind of a swine is this?" *held* admissible to rebut the effect of defendant's evidence that he was a member of the Red Cross and gave free posting to army and navy advertisements on his billboards, etc. —Heynacher v. U. S., 273.

(E) Arguments and Conduct of Counsel.

⚷721½(1) (U.S.C.C.A.S.C.) Argument by a district attorney to the jury, based upon his statement that no friend of defendant or citizen had appeared to testify in his behalf, or objected to his prosecution, evidence of which, if offered, would have been incompetent, *held* improper.—Hall v. U. S., 94.

⚷723(1) (U. S. C. C. A. Mo.) Argument of counsel for the government in a prosecution for offering to bribe member of draft board, referring to the war with Germany, etc., *held* to contain such an appeal to prejudices of the jurors as was likely to prevent a fair consideration of the issues.—August v. U. S., 428.

(F) Province of Court and Jury in General.

⚷753(1) (U.S.C.C.A.N.D.) It is the practice in the Eighth circuit to regard a general motion or request for a directed verdict, in either a civil or criminal case, as challenging the legal sufficiency of the evidence for a contrary conclusion.—McDowell v. U. S., 382.

⚷763, 764(17) (U.S.C.C.A.Wash.) In a prosecution for publishing a false circular with intent to hinder the operation of the military forces of the United States, instruction that evidence of the purchase and circulation of other literature by defendant, and of his statements and correspondence to show his condition of mind, had been permitted only to indicate the trend of his thought with relation to the particular act charged, *held* not improper as a comment on the evidence or as tending to confuse the jury.—Herman v. U. S., 551.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⚷814(1) (U.S.C.C.A.Wash.) Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), by force to prevent, hinder, and delay the execution of the joint resolution declaring a state of war to exist with Germany, etc., and they issued circulars against conscription, a charge on freedom of speech, referring to riots, *held* not open to attack, as being inapplicable; the court stating therein that it referred to riots merely for illustration.—Wells v. U. S., 555.

⚷822(7) (U.S.C.C.A.Wash.) Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to prevent by force the execution, etc., of laws of the United States, as the joint resolution declaring a state of war with Germany, and it appeared that they issued a circular against conscription, an excerpt from the charge, that the effect of the circular could not be neutralized or limited by any motive or intent not connected therewith, when considered with the charge as a whole, *held* correct.—Wells v. U. S., 555.

⚷822(11) (U.S.C.C.A.Wash.) Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and prevent by force the execution of the joint resolution of Congress declaring a state of war to exist with Germany, etc., and it appeared that they issued a circular against conscription, an instruction that defendants were presumed to know the law, and cannot shield themselves behind ignorance of the law, when considered with the charge as a whole, *held* not erroneous.—Wells v. U. S., 555.

In a prosecution for conspiracy, in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and prevent by force the execution of laws of the United States, such as the joint resolution of Congress declaring a state of war to exist with Germany, etc., a charge that every person is presumed to intend the natural consequences of his own act *held* correct, when considered with the charge as a whole; the criminality of the act not depending on a particular intent, etc.—Id.

⚷822(16) (U.S.C.C.A.Tex.) Instruction in criminal case, defining reasonable doubt as doubt for which sensible man could give good reason, based on evidence or want of evidence, *held* not erroneous, when construed as a whole; it being stated in the same sentence that it was such doubt as sensible man would act or decline to act upon.—Sotello v. U. S., 67.

⚷823(2) (U.S.C.C.A.Iowa) A recital by the judge to the jury of the evidence, although not in all respects correct, was not reversible error, where the jury were told that it was only his recollection, and not binding on them.—Nokis v. U. S., 453.

(H) Requests for Instructions.

⚷824(8) (U.S.C.C.A.Tex.) To put the court in error in not limiting effect of evidence admissible against one of the defendants, request by the others that this be done is necessary. —Bryant v. U. S., 418.

⚷829(1) (U.S.C.C.A.Wash.) The refusal of requested instructions covered by the charge given is not error.—Wells v. U. S., 555.

⚷829(3) (U.S.C.C.A.Nev.) In a prosecution for violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), where the court instructed that it was necessary for the government to prove that, while the United States was engaged in war, defendant made false statements with intent to promote the success of the enemy, the refusal of a requested instruction that, unless the jury was satisfied the words spoken were of the character, and of adequate and sufficient magnitude and proximity to the thing intended, to bear out the intent charged, defendant should be acquitted, was properly refused, being covered.—Shidler v. U. S., 570.

(K) Verdict.

⚷877 (U.S.C.C.A.Tex.) It is no ground for setting aside a conviction of certain defendants of conspiracy that the evidence may be equally strong against others who were acquitted.—Bryant v. U. S., 418.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⚷1032(6) (U.S.C.C.A.Wash.) The objection that an indictment is bad for duplicity is waived, where defendant does not test the same by demurrer, motion to quash, or motion that an election be required, and the appellate court will not consider such objection.—Wells v. U. S., 555.

⚷1036(8) (U.S.C.C.A.Okl.) Failure of witnesses to clearly identify a city mentioned in their testimony *held* waived, where the omission was not called to the attention of the trial court. —Weems v. U. S., 269.

⚷1038(1) (U.S.C.C.A.Wash.) The appellate court will not ordinarily look into any objections to the charge, unless they are timely made, and exceptions are regularly saved to the rulings thereon.—Wells v. U. S., 555.

⚷1043(2) (U.S.C.C.A.Wash.) An exception to the sustaining of an objection to a question to a witness cannot be considered, where it was not stated what the answer would be; the court not being advised as to the relevancy of the matter sought to be elicited.—Wells v. U. S., 555.

⚷1044 (U.S.C.C.A.Wash.) The objection that an indictment is bad for duplicity is waived, where defendant does not test the same by demurrer, motion to quash, or motion that an election be required, and the appellate court will not consider such objection.—Wells v. U. S., 555.

⚷1048 (U.S.C.C.A.S.C.) In the Circuit Court of Appeals, an assignment of error will not be considered, unless based on an exception.—Finley v. U. S., 191.

⚷1054(1) (U.S.C.C.A.Mont.) Rulings on evidence, not presented by an exception, cannot be considered on appeal.—Brown v. U. S., 653.

⚷1055 (U.S.C.C.A.Mo.) Under Judicial Code, § 269, as amended by Act Feb. 26, 1919, that "on the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties," it is the duty of the Circuit Court of Appeals to consider prejudicial remarks of counsel, although no exception was taken.—August v. U. S., 428.

⚷1056(1) (U.S.C.C.A.Alaska) Where no exceptions were taken to the instructions, the appellate court cannot consider assignments of error based on portions of an instruction.—Vedin v. U. S., 534.

⚷1056(1) (U.S.C.C.A.Wash.) The appellate court will not ordinarily look into any objections to the charge, unless exceptions are regularly saved to the rulings thereon.—Wells v. U. S., 555.

(D) Record and Proceedings Not in Record.

⚷1090(8) (U.S.C.C.A.Mich.) On appeal from a conviction, criticisms of alleged lack of evidence in certain respects, of asserted erroneous proceedings on trial, and of the introduction of certain undisputed evidence, cannot be considered, where the record contains no bill of exceptions, and thus no evidence.—Stetson v. U. S., 639.

⚷1090(11) (U.S.C.C.A.Mich.) On appeal from a conviction, criticisms of asserted erroneous proceedings on trial cannot be considered, where the record contains no bill of exceptions, and thus no evidence.—Stetson v. U. S., 639.

(E) Assignment of Errors and Briefs.

⚷1129(1) (U.S.C.C.A.Porto Rico) The Circuit Court of Appeals, in the exercise of its discretion, may notice a plain error on the face of the record in a criminal case, although not assigned.—Balbas v. U. S., 229.

(G) Review.

⚷1134(3) (U.S.C.C.A.S.D.) Where the punishment imposed did not exceed that authorized for one of two offenses, if no error was committed in respect to such offense, the other need not be considered.—Heynacher v. U. S., 273.

⚷1137(3) (U.S.C.C.A.Wash.) Where defendants requested a charge dealing with freedom of speech, they cannot attack a charge thereon as irrelevant; the giving of the same being invited. —Wells v. U. S., 555.

⚷1144(16) (U.S.C.C.A.R.I.) Where the evidence on which the jury returned verdict of guilty has not been reported, the Circuit Court of Appeals must accept the verdict as fully sustained by the evidence, if the allegations in the indictment were sufficient in law to sustain it.—Coldwell v. U. S., 151.

⚷1144(17) (U.S.C.C.A.Mich.) In the absence of evidence to the contrary, sentence which could have been imposed on conviction under either count of an indictment will be presumed to have been imposed under the valid count.—Stetson v. U. S., 639.

⚷1144(17) (U.S.C.C.A.Ohio) Where there is one good count in the indictment, and the evidence is sufficient in law to support it, and judgment is such as might have been imposed upon it alone, the presumption is that it was imposed upon the good count, supported by evidence, and will not be reversed, though there are bad counts, or counts unsupported by evidence.—Galbreath v. U. S., 598.

⚷1153(6) (U.S.C.C.A.Ohio) The sufficiency of proof of loss of records to warrant the admission of secondary evidence of their contents is primarily addressed to the trial judge, whose findings should not be disturbed, unless plainly wrong.—Galbreath v. U. S., 598.

⚷1158(1) (U.S.C.C.A.Wash.) It is for the trial court to say whether the evidence is sufficient to carry case to the jury.—Wells v. U. S., 555.

⚷1169(1) (U.S.C.C.A.Tex.) In a prosecution for murder committed on land alleged to be within the exclusive jurisdiction of the United States, where the land is described and shown by oral testimony to have been in the exclusive possession of the United States at the time, it was not necessary to prove its title, and introduction of title documents and deeds could not have injured defendant, whether technically proven or not.—Brown v. U. S., 258.

⚷1169(1) (U.S.C.C.A.Wash.) Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and obstruct by force laws of the United States, including the joint resolution declaring a state of war to exist with Germany, the admission of a transcript of stenographic notes of an interview with one of the defendants *held* harmless; the matter being fully covered by other witnesses.—Wells v. U. S., 555.

⚷1169(5) (U.S.C.C.A.Ohio) In a prosecution against the president and director of a bank for making false entries and misapplication of funds in connection with loans to a company which became bankrupt, the admission of evidence of the contents of books and records of such bankrupt was not error, where the court charged there was no presumption that defendants knew the contents of such books, and that evidence could be considered only to the extent it was shown defendants did have knowledge of the contents.—Galbreath v. U. S., 598.

⚷1169(6) (U.S.C.C.A.Tex.) No harm was done by admission of government evidence; all the defendants affected thereby having been acquitted.—Bryant v. U. S., 418.

⚷1169(7) (U.S.C.C.A.Tex.) Admission of declaration of one of defendants tried for conspiracy could not have injured the others, the jury being charged to consider declarations of a defendant only against himself or codefendants who were present and heard them, unless a conspiracy between him and the others was found; and he being acquitted necessarily involving a finding that he did not conspire with the others.—Bryant v. U. S., 418.

⚷1170(1) (U.S.C.C.A.Wash.) Where defendants were charged with violation of Criminal Code, § 6 (Comp. St. § 10170), for conspiring by force to hinder, delay, and obstruct the execution of the joint resolution declaring a state of war to exist with Germany, etc., and a defendant was permitted to testify fully concerning an organization against militarism of which he was a member, *held*, that the exclusion of what was done at local branches of the organization regarding conscription could not have harmed him or the other defendants.—Wells v. U. S., 555.

⚷1170½(6) (U.S.C.C.A.Okl.) In a criminal prosecution for using the mails to defraud, it was prejudicial error to permit counsel for the government, on cross-examination of defendant, to inquire as to the property he owned at the time of the alleged offense and at the time of trial, even though some of such questions were excluded.—Culver v. U. S., 275.

⚷1177 (U.S.C.C.A.Tex.) If either count of indictments for having violated and having conspired to violate the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q) was established, defendants have no just complaint; the sentence imposed having been within the maximum prescribed for the offense charged in either count.—Melanson v. U. S., 129.

(H) Determination and Disposition of Cause.

⚷1186(1) (U.S.C.C.A.N.Y.) In a prosecution of two defendants for conspiracy to defraud the United States, where on his writ of error there must be a reversal of the conviction of one defendant for the improper admission of evidence against him, there must also be a reversal of the conviction of the other.—Feder v. U. S., 644.

⚷1186(4) (U.S.C.C.A.Mich.) Objection to indictment for violating the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), in that it did not negative the exception of section 6 (Comp. St. § 6287*l*), relative to the dispensing of preparations and remedies not containing more than a quarter of a grain of morphine, *held* technical, unsubstantial, and unprejudicial, and within the terms of Comp. St. § 1691, and Judicial Code, § 269 (Comp. St. § 1246), as amended February 26, 1919.—Stetson v. U. S., 639.

⚷1186(4) (U.S.C.C.A.Tex.) In view of Rev. St. § 1025 (Comp. St. § 1691), imperfections in indictment for violating the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), in that it did not aver that cocaine is a derivative of coca leaves, and that morphine or heroin are salts or derivatives of opium, *held* harmless imperfections, carrying no consequences.—Melanson v. U. S., 129.

⚷1186(4) (U.S.C.C.A.Tex.) Any imperfection in indictment as to definiteness of averment of time of commission of offense is cured by Rev. St. § 1025 (Comp. St. § 1691).—Bryant v. U. S., 418.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

⚷1213 (U.S.C.C.A.Tex.) Grievance, on which is bottomed complaint that infliction of sentence of life imprisonment for a murder committed while defendant was in an abnormal mental condition is a cruel and unusual punishment, in violation of the Constitution, is not

with the sentence, but with the verdict of first degree murder.—Myres v. U. S., 125.

CROPS.

See Damages, ⚷23.

CUSTOMS AND USAGES.

See Costs, ⚷2, 251; Evidence, ⚷543; Sales, ⚷202, 218½.

⚷12(1) (U.S.C.C.A.Ark.) In suit on an implied contract, a local custom cannot be given controlling force, unless shown to have been known to and contemplated by the parties at the time the services were rendered.—Coco-Cola Co. v. Moore, 34.

CUSTOMS DUTIES.

See Animals, ⚷35.

VII. VIOLATIONS OF CUSTOMS LAWS.

⚷130 (U.S.C.C.A.Tex.) On information by the United States against a cattle company for forfeiture of cattle for unlawful importation, wherein individuals intervened and claimed the cattle or their value, judgment that the interveners recover from the cattle company possession of the cattle, and, if they were not delivered, recover a sum per head, the value as assessed for each head not delivered, *held* proper.—Morris Land & Cattle Co. v. Kilpatrick, 134.

DAMAGES.

See Carriers, ⚷134; Collision, ⚷130; Courts, ⚷405; Drains, ⚷49; Evidence, ⚷96; Tenancy in Common, ⚷55.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

⚷23 (U.S.C.C.A.Ark.) In an action for breach of a written contract by defendant to drill an artesian well and install a pump therein for irrigation purposes, damage to a rice crop on land which the well was intended to irrigate, based upon the difference between the rice crop actually raised and a rice crop raised on any adjoining land, resulting from failure to perform the contract, *held* not recoverable as special damages, in the absence of any provision in the contract indicating that such damages were contemplated by the parties.—Stebbins v. Selig, 314.

DEATH.

See Carriers, ⚷347; Commerce, ⚷27; Indians, ⚷15, 16; Insurance, ⚷453, 455, 456; Master and Servant, ⚷111, 278; Negligence, ⚷23; Pleading, ⚷218; Railroads, ⚷344, 350.

II. ACTIONS FOR CAUSING DEATH.

(D) Pleading and Evidence.

⚷58(1) (U.S.C.C.A.Ohio) The law presumes that one killed on a railroad crossing followed the instinct of self-preservation, and exercised due caution, and looked and listened for approaching trains; a presumption which is disputable and must yield to convincing evidence.—Robbins v. Pennsylvania Co., 621.

DECLARATION OF WAR.

See Conspiracy, ⚷34.

DECOY.

See Criminal Law, ⚷37.

DEEDS.

See Acknowledgment, ⚷52; Covenants, ⚷2; Equity, ⚷262; Estoppel, ⚷27, 37; Indians, ⚷15; Mortgages; Reformation of Instruments, ⚷16, 20; Vendor and Purchaser, ⚷242.

IV. PLEADING AND EVIDENCE.

⚷208(1) (U.S.C.C.A.Tex.) In suit by a receiver for an oil company and a lumber company against another lumber company for the timber on certain lands, evidence consisting of the fact of payment, of the signing of the deed, of the fact of acknowledgment, and the duty and obligation under which the grantor was at the time to hold the deed for the plaintiff lumber company, *held* sufficient to support finding of delivery.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

DEPOSITIONS.

See Witnesses, ⚷255.

DEPOSITS IN COURT.

⚷11 (U.S.C.C.A.Va.) Where an intervener recovers a part of a fund in court, also claimed by the United States, the clerk's poundage on the part so recovered is properly deducted therefrom.—Leary v. U. S., 330.

DESCENT AND DISTRIBUTION.

See Equity, ⚷262; Indians, ⚷15.

DETECTIVES.

See Criminal Law, ⚷37.

DISCHARGE.

See Bankruptcy, ⚷404, 413, 415, 418.

DISCLAIMER.

See Trade-Marks and Trade-Names, ⚷45.

DISLOYALTY.

See Army and Navy, ⚷40; Conspiracy, ⚷45; Criminal Law, ⚷371; War, ⚷4.

DISMISSAL AND NONSUIT.

See Appeal and Error, ⚷373, 397, 684; Bankruptcy, ⚷391; Courts, ⚷310, 405; Pleading, ⚷218; Trade-Marks and Trade-Names, ⚷93; Trial, ⚷11.

DISORDERLY HOUSE.

See Aliens, ⟹54.

DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, ⟹721½; Indictment and Information, ⟹52.

⟹3(4) (U.S.C.C.A.Mont.) Under Rev. St. § 363 (Comp. St. § 538), giving the Attorney General power to employ, in the name of the United States, attorneys to assist the district attorney in the discharge of his duties, an information is not open to attack because verified by an assistant United States district attorney, for such assistants come within the general rule that an assistant duly appointed to prosecute is clothed with all of the powers and privileges of the prosecuting attorney.—Brown v. U. S., 653.

DISTRICT OF COLUMBIA.

See Conspiracy, ⟹28; Criminal Law, ⟹242.

⟹4 (U.S.C.C.A.N.Y.) The Criminal Code is a general act, and is coextensive with federal jurisdiction, unless otherwise specifically directed, and applies to the District of Columbia.—Easterday v. McCarthy, 45.

DOCKS.

See Wharves.

DOMICILE.

See Army and Navy, ⟹20.

DRAFT.

See Army and Navy, ⟹20; Conspiracy, ⟹28, 45, 47; Criminal Law, ⟹97, 371, 406, 450, 723, 814, 822, 1170; Habeas Corpus, ⟹16; Perjury, ⟹9, 19; War, ⟹4.

DRAINS.

See Principal and Surety, ⟹162.

I. ESTABLISHMENT AND MAINTENANCE.

⟹49 (U.S.C.C.A.Miss.) Under Code Miss. 1906, § 387, regulating handling of money by swamp land district commissioners, the commissioners may sue contractor's surety in their own name.—Equitable Surety Co. v. Board of Com'rs of Muddy Bottom Swamp Land Dist. No. 1, Tippah County, Miss., 119.

In action on swamp land district contractor's bond, actual loss suffered from having to relet work may be recovered, including sums not yet due under the new contract.—Id.

DRAMSHOPS.

See Intoxicating Liquors.

DRUGGISTS.

See Conspiracy, ⟹48; Criminal Law, ⟹371; Poisons, ⟹4, 9.

DRUNKARDS.

See Homicide, ⟹22, 28.

DUE PROCESS OF LAW.

See Constitutional Law, ⟹307.

EASEMENTS.

See Waters and Water Courses, ⟹33.

EJECTMENT.

I. RIGHT OF ACTION AND DEFENSES.

⟹9(3) (U.S.C.C.A.Mo.) It is the settled law of Missouri that in an action of ejectment plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's title.—McGrew v. Byrd, 196.

⟹13 (U.S.C.C.A.Mo.) In the federal courts one cannot recover land in an action of ejectment on an equitable title only.—McGrew v. Byrd, 278.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

⟹109 (U.S.C.C.A.Mo.) Where by the laws of the state a patent of land to a deceased person is absolutely void, and there was substantial evidence that the patentee under whom plaintiff claimed was dead when the patent issued, it was error to direct a verdict for plaintiff.—McGrew v. Byrd, 196.

ELKINS ACT.

See Carriers, ⟹38.

EMINENT DOMAIN.

II. COMPENSATION.

(C) Measure and Amount.

⟹122 (U.S.C.C.A.N.M.) "Just compensation" rests on equitable principles, and it means substantially that the owner should be put in as good position pecuniarily as he would have had, it his property had not been taken.—U. S. v. Rogers, 437.

⟹148 (U.S.C.C.A.N.M.) An award for land taken under Reclamation Act June 17, 1902, (Comp. St. §§ 4700–4708), three years before condemnation proceedings were instituted under section 7 of the act (section 4706), *held* to properly include an amount equal to interest at the legal rate of the state until time of payment on the value of the land fixed by commissioners as of the date of the taking, not for interest as such, but as an element of the just compensation to which the owner is entitled under the Constitution.—U. S. v. Rogers, 437.

⟹148 (U.S.C.C.A.N.M.) That a landowner did not institute proceedings to recover compensation for land appropriated by the United States for public use does not debar him of the right to interest from the date of taking, as part of the compensation, since the permanency of the occupation is not always disclosed, or not even finally determined.—U. S. v. Highsmith, 441.

EMPLOYERS' LIABILITY ACTS.

See Master and Servant, ⚷204, 228.

EQUITY.

See Appeal and Error, ⚷1009; Bankruptcy, ⚷181, 293; Charities, ⚷18; Courts, ⚷310, 335; Ejectment, ⚷13; Estoppel, ⚷93; Injunction; Parties, ⚷15; Partition; Reformation of Instruments; Trial, ⚷11.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(C) Principles and Maxims of Equity.

⚷66 (U.S.C.C.A.La.) One is not entitled to the aid of a court of equity for the enforcement of any right he may have, unless he is ready and willing to do equity.—Louisiana Agricultural Corporation v. Pelican Oil Refining Co., 168.

III. PARTIES AND PROCESS.

⚷103 (U.S.C.C.A.Pa.) A decree in equity may not be made, in the absence of a party whose rights must necessarily be affected.—Himes v. Schmehl, 281.

⚷105 (U.S.C.C.A.Pa.) The rule that, where the contract is joint, so also is the remedy, likewise prevails in equity.—Himes v. Schmehl, 281.

IV. PLEADING.

(E) Demurrer, Exceptions, and Motions.

⚷262 (U.S.C.C.A.Okl.) Where a grantor is entitled to have a deed conveying a tract of land reformed, because of mutual mistakes and misrepresentations by the grantee, so as to convey only a one-half interest, a cross-bill in a suit to quiet the title by subsequent grantees, who were also grantees from the alleged husband of grantor's daughter, alleging that the daughter was not legally married, so that the grantor inherited the entire interest, raised an issue of fact, and it was error to give judgment against him on the pleadings.—Barnett v. Kunkle, 38.

In a suit to quiet title, where the defendants filed a cross-bill to reform a deed, answers to the cross-bill, alleging plaintiffs to be bona fide purchasers, allege an affirmative defense, which must be proved, and do not entitle plaintiffs to judgment on the pleadings.—Id.

EQUITY RULES.

See Court Rules Cited.

ERROR, WRIT OF.

See Appeal and Error.

ESPIONAGE ACT.

See Army and Navy, ⚷40; Criminal Law, ⚷369, 371, 683, 829; Indictment and Information, ⚷125, 140, 150; War, ⚷4.

ESTATES.

See Perpetuities; Tenancy in Common.

ESTOPPEL.

See Criminal Law, ⚷37; Principal and Surety, ⚷151; Sales, ⚷88.

I. BY RECORD.

⚷3(1) (U.S.C.C.A.Tex.) Excerpts from a pleading introduced by defendants in an equity suit are to be taken as evidence of the efforts of the several parties to procure advantage over their adversaries, rather than as matter in estoppel, or as declarations against interest, to be taken advantage of by one not a party to the suit.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

II. BY DEED.

(A) Creation and Operation in General.

⚷27(1) (U.S.C.C.A.Utah) A coal land entryman, who conveyed the same for a valuable consideration after filing his declaratory statement, but before completing his entry, and who on receiving the patent delivered it to his grantee, is estopped to deny the validity of his conveyance, and a subsequent grantee from him with notice is equally estopped.—Ketchum v. Pleasant Valley Coal Co., 358.

(B) Estates and Rights Subsequently Acquired.

⚷37 (U.S.C.C.A.Tex.) A deed using the words "grant, sell, and convey," not "quitclaim," and conveying property by specific description, not merely the "interest" owned by the grantor, was effective to pass an after-acquired title.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

⚷47 (U.S.C.C.A.Utah) A patent for coal land, issued to an entryman who has previously conveyed his right in the land, inures to the benefit of his grantee, under Comp. Laws Utah 1907, § 1979.—Ketchum v. Pleasant Valley Coal Co., 358.

III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

⚷68(4) (U.S.C.C.A.Ohio) Where defendant's tender was open to be interpreted as a cancellation of the patent license contract, and in preceding litigation complainant's assignee did so interpret the tender, and acted under that interpretation until selling his interest to complainant, *held*, that defendant was estopped from claiming its tender should have been construed as a rescission.—Miami Cycle & Mfg. Co. v. Allen, 540.

Where, on first trial, decree was rendered for complainant for royalties due under an exclusive patent license contract, on the theory that there had been a mutual cancellation, and that theory was urged by defendant on motion for rehearing on appeal from first decree, *held*, in view of subsequent surrender by assignee of original complainant of right to recover damages and profits from infringement by others, defendant cannot question the acceptance of the offer.—Id.

⚷72 (U.S.C.C.A.La.) Where one of the parties to a sale has been misled to his disadvantage by the conduct of the other, based on mistake, when he had a right to assume the

other was acting with full knowledge of the facts, and it being impossible for the parties to be restored to their original condition, the party who has suffered by the mistake will be protected.—Brooks-Scanlon Co. v. Illinois Cent. R. Co., 319.

⚷88(2) (U.S.C.C.A.Alaska) That a director of a national bank signed his name to reports to the Comptroller of the Currency, representing branches maintained by the bank to be separate institutions, *held*, as the bank knew all the facts in relation thereto, and did not act to its detriment in reliance on the reports, not to estop the director from asserting, in a suit by the bank to recover against him because of excessive loans to a branch, that such branches were part of the bank itself.—First Nat. Bank of Fairbanks v. Noyes, 543.

⚷93(8) (U.S.C.C.A.Utah) Possession of land by a grantee for more than 20 years, during which time it expended large sums in improvements, is a bar to a suit in equity to recover the land by adverse claimants, who had knowledge of such possession and use.—Ketchum v. Pleasant Valley Coal Co., 358.

EVIDENCE.

See Criminal Law, ⚷304–563; New Trial, ⚷72; Pleading, ⚷34, 236; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, ⚷673–683.

II. PRESUMPTIONS.

⚷69 (U.S.C.C.A.Ark.) Under a rule of a cotton exchange requiring a seller to deliver to the buyer a signed seller's slip and to furnish a corresponding buyer's slip, which shall be signed and returned by the buyer, the introduction in evidence of one of such slips raises a legal presumption that the corresponding slip in the same terms was also executed.—Thorn v. Browne, 469.

III. BURDEN OF PROOF.

⚷96(2) (U.S.C.C.A.Va.) A railroad contractor, sued by subcontractors, *held* to have the burden of proving as an affirmative defense that damage for which it paid a judgment to a landowner was caused by unskillfulness or negligence of plaintiffs, for which they contracted to be responsible.—Rinehart & Dennis Co. v. Childress & Taylor, 249.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(C) Similar Facts and Transactions.

⚷142(5) (U.S.C.C.A.Ark.) In an action by attorneys for compensation for services rendered defendant company in its suit to restrain unfair competition, defendant's evidence as to compensation which it had paid attorneys in other actions was properly ruled out, as opening the door to the admission of collateral issues, and also as possibly based on specific contracts.—Coco-Cola Co. v. Moore, 34.

VII. ADMISSIONS.

(D) By Agents or Other Representatives.

⚷244(12) (U. S. C. C. A. Tex.) Statement of president of bank, to one to whom its certificate of deposit had been issued by its prior president in payment of his individual debt, that its books showed the deposit called for thereby, is not inadmissible against it, in the absence of injury therefrom raising an estoppel; it amounting to an admission that past transactions had occurred and had been evidenced by the bank's books.—First Nat. Bank of Sweetwater, Tex., v. Rust, 241.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

⚷272 (U.S.C.C.A.Tex.) Excerpts from a pleading introduced by defendant in an equity suit are to be taken as evidence of the efforts of the several parties to procure advantage of their adversaries, rather than as declarations against interest.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

X. DOCUMENTARY EVIDENCE.

(A) Public or Official Acts, Proceedings, Records, and Certificates.

⚷332(1) (U.S.C.C.A.Va.) The record on appeal in an action in a state court, including evidence, *held* not admissible in an action in a federal court between two of the defendants, in which the issues were not the same.—Rinehart & Dennis Co. v. Childress & Taylor, 249.

(B) Exemplifications, Transcripts, and Certified Copies.

⚷342 (U.S.C.C.A.Mo.) Under Missouri statutes relating to sale of swamp lands by a county, providing for issuance in triplicate of certificate of purchase by the register, one to be filed by him, that on presentation of a copy to the receiver and payment he should issue a receipt, on which patent should be issued by the county court, a certified copy of a record of a certificate from the books of the register is not admissible to prove title in the purchaser; there being no provision for such record, nor authority to convey title, except on the receiver's receipt.—McGrew v. Byrd, 196.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

⚷487 (U.S.C.C.A.Ark.) The officers of a corporation which employed attorneys to conduct a suit to restrain unfair trade competition were not qualified as laymen to express an opinion as to the reasonable value of the services of counsel, for such evidence can be given only by members of the bar.—Coco-Cola Co. v. Moore, 34.

(C) Competency of Experts.

⚷543(2) (U.S.C.C.A.Ark.) An opinion as to the reasonable value of the services of counsel can be given only by members of the bar.—Coco-Cola Co. v. Moore, 34.

In an action by attorneys to recover for professional services rendered defendant company

in conducting a suit to restrain unfair trade competition, evidence of attorneys who had not had experience in trade-mark or unfair competition cases was admissible on behalf of plaintiff attorneys.—Id.

In an action by attorneys for services rendered defendant company in suit to restrain unfair trade competition by another firm, testimony of three lawyers, experts in the field of trade-mark and unfair competition, and possessed of large experience in courts where such litigation is carried on, was admissible on behalf of defendant company, though the attorneys knew nothing about the customary fees charged at the local bar of the small city where the case was tried.—Id.

(F) Effect of Opinion Evidence.

⚷572 (U.S.C.C.A.Ark.) In an action by attorneys to recover for professional services rendered defendant company in conducting a suit to restrain unfair trade competition, evidence of attorneys who had not had experience in trade-mark or unfair competition cases was admissible on behalf of plaintiff attorneys; objection that such witnesses were not qualified going to the weight, and not the admissibility, of the evidence.—Coco-Cola Co. v. Moore, 34.

EXCEPTIONS, BILL OF.

See Criminal Law, ⚷1090.

II. SETTLEMENT, SIGNING, AND FILING.

⚷36(1) (U.S.C.C.A.Canal Zone) The provision of Panama Canal Act Aug. 24, 1912, that the appellate jurisdiction of the Circuit Court of Appeals on appeals from the District Court of the Canal Zone may be exercised in the same manner, as nearly as practicable, as in reviewing judgments of the District Courts of the United States, shows that the earlier provision of the same section, that existing laws of the Canal Zone should be applicable to practice in new courts, was not intended to make applicable to appeals to the Circuit Court of Appeals Code Civ. Proc. Canal Zone, § 136, requiring bills of exception for review by the Supreme Court of the Canal Zone to be presented to trial court within 10 days.—Panama R. Co. v. Curran, 114.

EXCHANGE OF PROPERTY.

See Corporations, ⚷542.

EXCHANGES.

See Evidence, ⚷69.

EXEMPTIONS.

See Army and Navy, ⚷20; Criminal Law, ⚷97, 450; Habeas Corpus, ⚷16; Perjury, ⚷19.

FACTORS.

See Brokers.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Master and Servant, ⚷204, 228.

FEDERAL OPERATION OF RAILROADS.

See Railroads, ⚷5½.

FEDERAL SAFETY APPLIANCE ACT.

See Commerce, ⚷8, 27; Master and Servant, ⚷111.

FELLOW SERVANTS.

See Master and Servant, ⚷185.

FINES.

See Sales, ⚷484.

FIRES.

See Appeal and Error, ⚷719, 1048; Carriers, ⚷25, 132, 134, 136.

F. O. B.

See Sales, ⚷79, 82, 87.

FOREIGN CORPORATIONS.

See Corporations, ⚷640.

FORFEITURES.

See Animals, ⚷35; Appearance, ⚷20; Customs and Usages, ⚷130; Internal Revenue, ⚷42; Mines and Minerals, ⚷79; Seamen, ⚷21; Waters and Water Courses, ⚷33.

FORGERY.

See Bills and Notes, ⚷434; Carriers, ⚷57, 58, 71, 94.

FOR VALUE RECEIVED.

See Guaranty, ⚷25.

FRAUD.

See Aliens, ⚷23, 32; Bailment, ⚷14; Bankruptcy, ⚷165, 407, 468; Banks and Banking, ⚷256, 257; Constitutional Law, ⚷46; Courts, ⚷264; Criminal Law, ⚷97, 402, 424, 673, 829, 1169, 1170½, 1186; Equity, ⚷262; Frauds, Statute of; Indictment and Information, ⚷108; Perjury, ⚷19; Principal and Surety, ⚷162; War, ⚷4.

FRAUDS, STATUTE OF.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

⚷115(3) (U.S.C.C.A.Ark.) Under Cotton Futures Act Aug. 11, 1916, § 4 (Comp. St. § 6309d), providing that "each contract of sale of cotton for future delivery * * * shall be in writing plainly stating, or evidenced by written memorandum showing, the terms of such contract, * * * and shall be signed by the par-

ty to be charged, or by his agent in his behalf," a broker's seller's slip or buyer's slip, duly signed "by the party to be charged" in accordance with the rules of the exchange, is sufficient to prove a valid sale or purchase, and it is not essential that the contract be signed by both parties, or that both the seller's and buyer's slips shall be introduced in evidence.—Thorn v. Browne, 469.

⟹116(9) (U.S.C.C.A.Ark.) Where contracts for purchase and sale of cotton futures are made between brokers on an exchange, where brokers only can make such contracts, Cotton Futures Act Aug. 11, 1916, § 4 (Comp. St. § 6309d), does not require that the contracts should show the names of the principals for whom they act.—Thorn v. Browne, 469.

FRAUDULENT CONVEYANCES.

See Corporations, ⟹228.

FUTURES.

See Brokers, ⟹85; Frauds, Statute of, ⟹115, 116.

GAMING.

See Frauds, Statute of, ⟹115, 116.

GAS.

See Bankruptcy, ⟹43; Corporations, ⟹586, 590; Courts, ⟹312; Mines and Minerals, ⟹79.

GERMANY.

See Conspiracy, ⟹34; Criminal Law, ⟹304.

GIFTS.

See Charities, ⟹37, 38; Perpetuities, ⟹4.

GOVERNMENT OPERATION OF RAILROADS.

See Railroads, ⟹5½.

GUARANTY.

See Bankruptcy, ⟹328, 331, 345; Carriers, ⟹56; Corporations, ⟹218; Mortgages, ⟹25.

I. REQUISITES AND VALIDITY.

⟹25(3) (U.S.C.C.A.S.D.) The words "for value received," in an indorsement of guaranty, affirmatively express a consideration, which casts upon the guarantor the burden of proving that there was none, and a mere denial that anything was paid him does not discharge it.—International Harvester Co. of America v. Patterson, 451.

HABEAS CORPUS.

See Aliens, ⟹54.

I. NATURE AND GROUNDS OF REMEDY.

⟹16 (U.S.C.C.A.Mont.) Ignorance of the law and the facts on the part of a nondeclarant alien, who did not prove affirmatively before his local draft board the facts bringing him within the class exempted from Selective Service Act May 18, 1917 (Comp. St. 1918, §§ 2044a–2044h), so that he has been arrested as a military deserter, is no ground for habeas corpus; the alien's failure to avail himself of the remedies of the act and the rules precluding such relief, for only on showing of denial of fair hearing or abuse of discretion in the local or district draft board may resort be had to the courts.—Napore v. Rowe, 178.

⟹25(1) (U.S.C.C.A.Cal.) A Chinese person ordered deported is not entitled to discharge on habeas corpus, because she was denied the right of counsel at her preliminary hearing, where after examination a second warrant was issued, and she was notified in the presence of her counsel of a right to counsel, and at that time, without objection by counsel then representing her, the former examination was introduced in evidence as a part of the record in the proceedings under the second warrant.—Jung Back Sing v. White, 456.

A Chinese person ordered deported by the immigration authorities was not denied a fair hearing, so as to be entitled to discharge on habeas corpus, because the immigration authorities admitted in evidence the testimony given by a witness in a case in the state court, without showing that the witness was not available in person, where counsel for such Chinese person merely requested that all of the evidence of the witness be introduced, and made no objection to the introduction of the whole record of the testimony in the case in the state court.—Id.

A Chinese woman ordered deported was not denied a fair hearing, so as to be entitled to habeas corpus, because the immigration authorities refused to allow her alleged husband to testify in person, where the inspector requested an affidavit of the husband and considered the same.—Id.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⟹113(9) (U.S.C.C.A.La.) On an appeal from an order on a habeas corpus hearing directing that an alien be released from custody by the Commissioner of Immigration, it cannot properly be said that the overruling of an objection to the admission of testimony by the alien "on the ground that the court had no jurisdiction to receive evidence and inquire into the merits of said cause, without ascertaining whether the alien L. was given a fair trial by the immigration authorities," was error; it not being made to appear that the stated ground of objection existed in fact, the record not disclosing what the evidence was.—Mayo v. U. S., 185.

⟹113(12) (U.S.C.C.A.La.) On appeal from a habeas corpus proceeding, it must be presumed that the findings of the lower court were proper, where the record does not show the contrary.—Mayo v. U. S., 185.

HARMLESS ERROR.

See Appeal and Error, ⟹1026–1067; Criminal Law, ⟹1169–1177.

HARRISON NARCOTIC ACT.

See Conspiracy, ⚷48; Criminal Law, ⚷371, 472, 1177, 1186; Indictment and Information, ⚷110, 111; Poisons, ⚷2, 4, 9.

HEALTH.

See Insurance, ⚷648.

HOMESTEAD.

See Bankruptcy, ⚷143.

HOMICIDE.

See Criminal Law, ⚷369, 1169, 1213; Indictment and Information, ⚷110.

II. MURDER.

⚷22(1) (U.S.C.C.A.Tex.) Abnormal mental and nervous condition, during recovery from spree, of one committing homicide, does not serve to excuse or lower the degree of his offense, provided he was capable of knowing right from wrong, and had will power to do right and abstain from wrong, and capacity to form the deliberate and malicious intent necessary for first degree murder.—Myres v. U. S., 125.

⚷28 (U.S.C.C.A.Tex.) Abnormal mental and nervous condition, during recovery from spree, of one committing homicide, does not serve to excuse or lower the degree of his offense, provided he was capable of knowing right from wrong, and had will power to do right and abstain from wrong, and capacity to form the deliberate and malicious intent necessary for first degree murder.—Myers v. U. S., 125.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

⚷118(1) (U.S.C.C.A.Tex.) One attacked by another with a knife, not in his own house or on his own premises, is justified in fatally shooting his assailant only where apparently he cannot avoid his own injury by retreating.—Brown v. U. S., 258.

VII. EVIDENCE.

(E) Weight and Sufficiency.

⚷253(1) (U.S.C.C.A.Tex.) Evidence in homicide case *held* to warrant finding of capacity to form, and of forming, deliberate and malicious intent to kill, necessary for murder in first degree.—Myres v. U. S., 125.

VIII. TRIAL.

(C) Instructions.

⚷300(1) (U.S.C.C.A.Tex.) The killing being when deceased was standing inoffensive and unarmed, in peaceful conversation with third person, submission in instruction of issue of self-defense, even under rule of apparent danger, is not required, on evidence merely that deceased, who had a bad reputation for peace and quietness, had recently threatened defendant's life, and had his hand in his pocket, where it remained till he was shot.—Myres v. U. S., 125.

HUSBAND AND WIFE.

See Bankruptcy, ⚷181; Criminal Law, ⚷97; Habeas Corpus, ⚷25; Marriage; Perjury, ⚷9, 19.

ILLITERACY.

See Criminal Law, ⚷338.

IMMIGRATION.

See Aliens, ⚷54.

IMPROVEMENTS.

See Estoppel, ⚷93; Patents, ⚷174.

INCOME TAX.

See Courts, ⚷297.

INDEMNITY.

See Guaranty; Principal and Surety, ⚷185.

INDIANS.

See Reformation of Instruments, ⚷20; States, ⚷9.

⚷15(1) (U.S.C.C.A.Okl.) The provision of Act May 27, 1908, § 9, that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of the said allottee's land, does not remove restrictions upon alienation by the acts of such allottee before his death, but leaves such acts subject to the same restrictions that existed while he lived.—Anchor Oil Co. v. Gray, 361.

The provision in Act May 27, 1908, § 9, that no conveyance of any interest of any full-blood heir in such land shall be valid, unless approved by the court having jurisdiction of the settlement of the estate of the deceased allottee, is inapplicable to conveyances made by such heir before its passage and to those made by a full-blood Creek allottee.—Id.

⚷16(2) (U.S.C.C.A.Okl.) Act March 1, 1907, declaring the filing in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, of a lease of an allotment of Indian land, to be constructive notice, especially in view of it being a special act, is not repealed, annulled, or modified by admission of Oklahoma to the Union, by the recordation statutes of the territory or state (Rev. Laws Okl. 1910, §§ 1154, 1155), by the Enabling Act, the Constitution, or the Schedule to the Constitution of that state.—Anchor Oil Co. v. Gray, 361.

⚷16(3) (U.S.C.C.A.Okl.) The authority of the Secretary of the Interior, under Act April 26, 1906, § 20, to approve and thereby to validate a lease by a full-blood Creek Indian allottee of his or her allotment, continues after his or her death.—Anchor Oil Co. v. Gray, 361.

Lease of allottee of the Five Indian Tribes of his lands, when approved after his death by the Secretary of the Interior, relates back to and takes effect as of the date of its execution, except as against any persons without notice, though it provides its term shall be from approval by the Secretary.—Id.

cumstances would not be in the course of a physician's regular practice was admissible, on the issue whether the drug was dispensed in the legitimate course of defendants' practice as physicians.—Melanson v. U. S., 129.

(K) Confessions.

⚷535(1) (U.S.C.C.A.Okl.) A conviction on statements of the defendant will not be sustained without corroborative proof of the corpus delicti.—Goff v. U. S., 378.

(M) Weight and Sufficiency.

⚷563 (U.S.C.C.A.Okl.) Evidence *held* insufficient to sustain a conviction where, aside from statements made by defendant before his arrest, it was as consistent with the commission of a different offense as with that of the crime charged.—Goff v. U. S., 378.

XII. TRIAL.

(C) Reception of Evidence.

⚷673(4) (U.S.C.C.A.N.Y.) In a prosecution for conspiracy to defraud the United States, where testimony was admitted of the statements or admissions of one defendant, made to a representative of the Department of Justice after the conspiracy had ended in failure, it was prejudicial error to refuse to instruct that such statements, made out of court, were not competent as against the other defendant.—Feder v. U. S., 644.

⚷683(1) (U.S.C.C.A.S.D.) In a prosecution for violating Espionage Act, tit. 1, § 3 (Comp. St. 1918, § 10212c), by attempting to cause disloyalty in the military forces and by obstructing recruiting, a letter from defendant to the president of the German-American Alliance of his state, inclosing a newspaper clipping telling of the escape of a German soldier, who told of the brutality of German officers, conditions behind the German lines, etc., with defendant's comment, "What kind of a swine is this?" *held* admissible to rebut the effect of defendant's evidence that he was a member of the Red Cross and gave free posting to army and navy advertisements on his billboards, etc. —Heynacher v. U. S., 273.

(E) Arguments and Conduct of Counsel.

⚷721½(1) (U.S.C.C.A.S.C.) Argument by a district attorney to the jury, based upon his statement that no friend of defendant or citizen had appeared to testify in his behalf, or objected to his prosecution, evidence of which, if offered, would have been incompetent, *held* improper.—Hall v. U. S., 94.

⚷723(1) (U. S. C. C. A. Mo.) Argument of counsel for the government in a prosecution for offering to bribe member of draft board, referring to the war with Germany, etc., *held* to contain such an appeal to prejudices of the jurors as was likely to prevent a fair consideration of the issues.—August v. U. S., 428.

(F) Province of Court and Jury in General.

⚷753(1) (U.S.C.C.A.N.D.) It is the practice in the Eighth circuit to regard a general motion or request for a directed verdict, in either a civil or criminal case, as challenging the legal sufficiency of the evidence for a contrary conclusion.—McDowell v. U. S., 382.

⚷763, 764(17) (U.S.C.C.A.Wash.) In a prosecution for publishing a false circular with intent to hinder the operation of the military forces of the United States, instruction that evidence of the purchase and circulation of other literature by defendant, and of his statements and correspondence to show his condition of mind, had been permitted only to indicate the trend of his thought with relation to the particular act charged, *held* not improper as a comment on the evidence or as tending to confuse the jury.—Herman v. U. S., 551.

(G) Necessity, Requisites, and Sufficiency of Instructions.

⚷814(1) (U.S.C.C.A.Wash.) Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), by force to prevent, hinder, and delay the execution of the joint resolution declaring a state of war to exist with Germany, etc., and they issued circulars against conscription, a charge on freedom of speech, referring to riots, *held* not open to attack, as being inapplicable; the court stating therein that it referred to riots merely for illustration.—Wells v. U. S., 555.

⚷822(7) (U.S.C.C.A.Wash.) Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to prevent by force the execution, etc., of laws of the United States, as the joint resolution declaring a state of war with Germany, and it appeared that they issued a circular against conscription, an excerpt from the charge, that the effect of the circular could not be neutralized or limited by any motive or intent not connected therewith, when considered with the charge as a whole, *held* correct.—Wells v. U. S., 555.

⚷822(11) (U.S.C.C.A.Wash.) Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and prevent by force the execution of the joint resolution of Congress declaring a state of war to exist with Germany, etc., and it appeared that they issued a circular against conscription, an instruction that defendants were presumed to know the law, and cannot shield themselves behind ignorance of the law, when considered with the charge as a whole, *held* not erroneous.—Wells v. U. S., 555.

In a prosecution for conspiracy, in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and prevent by force the execution of laws of the United States, such as the joint resolution of Congress declaring a state of war to exist with Germany, etc., a charge that every person is presumed to intend the natural consequences of his own act *held* correct, when considered with the charge as a whole; the criminality of the act not depending on a particular intent, etc.—Id.

⚷822(16) (U.S.C.C.A.Tex.) Instruction in criminal case, defining reasonable doubt as doubt for which sensible man could give good reason, based on evidence or want of evidence, *held* not erroneous, when construed as a whole; it being stated in the same sentence that it was such doubt as sensible man would act or decline to act upon.—Sotello v. U. S., 67.

⚷823(2) (U.S.C.C.A.Iowa) A recital by the judge to the jury of the evidence, although not in all respects correct, was not reversible error, where the jury were told that it was only his recollection, and not binding on them.—Nokis v. U. S., 453.

(H) Requests for Instructions.

⚷824(8) (U.S.C.C.A.Tex.) To put the court in error in not limiting effect of evidence admissible against one of the defendants, request by the others that this be done is necessary.—Bryant v. U. S., 418.

⚷829(1) (U.S.C.C.A.Wash.) The refusal of requested instructions covered by the charge given is not error.—Wells v. U. S., 555.

⚷829(3) (U.S.C.C.A.Nev.) In a prosecution for violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), where the court instructed that it was necessary for the government to prove that, while the United States was engaged in war, defendant made false statements with intent to promote the success of the enemy, the refusal of a requested instruction that, unless the jury was satisfied the words spoken were of the character, and of adequate and sufficient magnitude and proximity to the thing intended, to bear out the intent charged, defendant should be acquitted, was properly refused, being covered.—Shidler v. U. S., 570.

(K) Verdict.

⚷877 (U.S.C.C.A.Tex.) It is no ground for setting aside a conviction of certain defendants of conspiracy that the evidence may be equally strong against others who were acquitted.—Bryant v. U. S., 418.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

⚷1032(6) (U.S.C.C.A.Wash.) The objection that an indictment is bad for duplicity is waived, where defendant does not test the same by demurrer, motion to quash, or motion that an election be required, and the appellate court will not consider such objection.—Wells v. U. S., 555.

⚷1036(8) (U.S.C.C.A.Okl.) Failure of witnesses to clearly identify a city mentioned in their testimony *held* waived, where the omission was not called to the attention of the trial court.—Weems v. U. S., 269.

⚷1038(1) (U.S.C.C.A.Wash.) The appellate court will not ordinarily look into any objections to the charge, unless they are timely made, and exceptions are regularly saved to the rulings thereon.—Wells v. U. S., 555.

⚷1043(2) (U.S.C.C.A.Wash.) An exception to the sustaining of an objection to a question to a witness cannot be considered, where it was not stated what the answer would be; the court not being advised as to the relevancy of the matter sought to be elicited.—Wells v. U. S., 555.

⚷1044 (U.S.C.C.A.Wash.) The objection that an indictment is bad for duplicity is waived, where defendant does not test the same by demurrer, motion to quash, or motion that an election be required, and the appellate court will not consider such objection.—Wells v. U. S., 555.

⚷1048 (U.S.C.C.A.S.C.) In the Circuit Court of Appeals, an assignment of error will not be considered, unless based on an exception.—Finley v. U. S., 191.

⚷1054(1) (U.S.C.C.A.Mont.) Rulings on evidence, not presented by an exception, cannot be considered on appeal.—Brown v. U. S., 653.

⚷1055 (U.S.C.C.A.Mo.) Under Judicial Code, § 269, as amended by Act Feb. 26, 1919, that "on the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties," it is the duty of the Circuit Court of Appeals to consider prejudicial remarks of counsel, although no exception was taken.—August v. U. S., 428.

⚷1056(1) (U.S.C.C.A.Alaska) Where no exceptions were taken to the instructions, the appellate court cannot consider assignments of error based on portions of an instruction.—Vedin v. U. S., 534.

⚷1056(1) (U.S.C.C.A.Wash.) The appellate court will not ordinarily look into any objections to the charge, unless exceptions are regularly saved to the rulings thereon.—Wells v. U. S., 555.

(D) Record and Proceedings Not in Record.

⚷1090(8) (U.S.C.C.A.Mich.) On appeal from a conviction, criticisms of alleged lack of evidence in certain respects, of asserted erroneous proceedings on trial, and of the introduction of certain undisputed evidence, cannot be considered, where the record contains no bill of exceptions, and thus no evidence.—Stetson v. U. S., 639.

⚷1090(11) (U.S.C.C.A.Mich.) On appeal from a conviction, criticisms of asserted erroneous proceedings on trial cannot be considered, where the record contains no bill of exceptions, and thus no evidence.—Stetson v. U. S., 639.

(E) Assignment of Errors and Briefs.

⚷1129(1) (U.S.C.C.A.Porto Rico) The Circuit Court of Appeals, in the exercise of its discretion, may notice a plain error on the face of the record in a criminal case, although not assigned.—Balbas v. U. S., 229.

(G) Review.

⚷1134(3) (U.S.C.C.A.S.D.) Where the punishment imposed did not exceed that authorized for one of two offenses, if no error was committed in respect to such offense, the other need not be considered.—Heynacher v. U. S., 273.

⚷1137(3) (U.S.C.C.A.Wash.) Where defendants requested a charge dealing with freedom of speech, they cannot attack a charge thereon as irrelevant; the giving of the same being invited.—Wells v. U. S., 555.

⚷1144(16) (U.S.C.C.A.R.I.) Where the evidence on which the jury returned verdict of guilty has not been reported, the Circuit Court of Appeals must accept the verdict as fully sustained by the evidence, if the allegations in the indictment were sufficient in law to sustain it.—Coldwell v. U. S., 151.

ing circumstances, with regard to the evident purpose of the parties and the nature of the general undertaking of the insurer towards its policy holders, whether the insurer be a mutual or a stock company.—Federal Life Ins. Co. v. Kemp, 349.

⟹146(3) (U.S.C.C.A.Iowa) Rule of construction that doubt should be resolved against insurer cannot be applied to a clause which is reasonably clear.—Interstate Business Men's Accident Ass'n v. Lewis, 325.

⟹146(3) (U.S.C.C.A.Kan.) If the language of a life or accident policy does not express an exception, when fairly interpreted, the courts will not write an exception into it by interpretation, for the purpose of exempting the insurer from liability after death or accident.—Interstate Business Men's Acc. Ass'n of Des Moines, Iowa, v. Lester, 309.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(E) Nonpayment of Premiums or Assessments.

⟹367(2) (U.S.C.C.A.Ind.) Where an insurance policy provided that, in case of default by the policy holder, he might accept a cash surrender value, a paid-up life policy, or extended insurance, and at the time of default in the payment of premiums the policy holder was indebted to the insurer for more than the cash surrender value of the policy, the right of the insurer under the policy to deduct the indebtedness applied to the surrender value in terms of extended insurance, not merely to the cash surrender value.—Federal Life Ins. Co. v. Kemp, 349.

Where a life insurance contract provided for a cash payment of premiums annually of 50 per cent., the remaining part of the premium to be considered as indebtedness, such indebtedness was an "indebtedness on account of the policy," within a policy provision for deduction of indebtedness from the surrender value of the policy in case of default in payment of premiums.—Id.

XII. RISKS AND CAUSES OF LOSS.

(E) Accident and Health Insurance.

⟹453(U.S.C.C.A.Kan.) A physician, who at the time of insurance and of his death was in the general practice, and was also a medical officer in the state National Guard, with the rank of major, and who on the day he was killed, after visiting his patients, had gone out, as surgeon only, with a detachment of the guard which was on emergency service at the town of his residence during a strike, *held* to have been "engaged in the occupation of physician and surgeon," within the terms of the policy.—Interstate Business Men's Acc. Ass'n of Des Moines, Iowa, v. Lester, 309.

To constitute a change of occupation from that specified in a life or accident policy, it must be abandoned and some other calling adopted.—Id.

⟹455 (U.S.C.C.A.Iowa) Means of death were accidental, within an accident policy, where deceased selected a scarf pin, in ignorance of its infected condition, to puncture a pimple.—Interstate Business Men's Accident Ass'n v. Lewis, 325.

⟹455 (U.S.C.C.A.Iowa) Death of insured from opening a pimple with an infected pin *held* the result of receiving a bodily injury through external, violent, and accidental means within the terms of an accident policy.—Iowa State Traveling Men's Ass'n v. Lewis, 536.

⟹455 (U.S.C.C.A.Kan.) If a person holding a policy insuring him against accidental injury does something which culpably provokes or induces the act causing his injury or death, then the result is not accidental; but, if he is wholly free from culpability himself, the result is accidental as to him, though it may have been within the deliberate intent of the aggressor.—Interstate Business Men's Acc. Ass'n of Des Moines, Iowa, v. Lester, 309.

The death of a physician, who was a medical officer in a National Guard regiment, and who was shot and killed while performing his duty as such officer with a detachment of the guard detailed to preserve order during a strike, *held* accidental, within the meaning of an insurance policy.—Id.

⟹456 (U.S.C.C.A.Iowa) Where insured died as the result of opening a pimple with an infected pin, *held*, that the wound was an open one, etc., within the provisions of the policy exempting the insurer from liability for local or general infection, except when such infection results from a visible or open wound caused by external, violent, and accidental means.—Iowa State Traveling Men's Ass'n v. Lewis, 536.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(E) Accident and Health Insurance.

⟹530 (U.S.C.C.A.Iowa) Where insured punctured a pimple with an infected pin, in ignorance that pin was infected, and infection was immediately communicated and spread, whether death ensuing therefrom be ascribed to the original injury, under the doctrine of proximate cause, or whether the infection be deemed a part of the injury, the case is governed by the clause of the policy providing that whenever, as the direct result of an injury occurring solely by external, violent, and accidental means, the skin is punctured, and there is introduced into the system through the puncture, and by the same means causing the puncture, any bacteria which shall produce blood poisoning or infection, indemnity for disability or death resulting therefrom shall not exceed $500.—Interstate Business Men's Accident Ass'n v. Lewis, 325.

The definite article before the word "outer," in clause of accident policy limiting liability, relative to puncturing "the skin or the outer covering of the eye," shows the word "skin" refers to the skin of the body, and not the outer covering of the eye.—Id.

XVIII. ACTIONS ON POLICIES.

⟹648(1) (U.S.C.C.A.N.Y.) Evidence that an insured was in poor health at the time of the assignment of the policy, and of knowledge of such fact by the assignee, is competent on the question whether the assignment was with wagering intent.—Finnie v. Walker, 648.

INSURRECTION.

See Army and Navy, ⚷40; Conspiracy, ⚷27, 45; Criminal Law, ⚷371, 683; Indictment and Information, ⚷87, 125, 140, 150; War, ⚷4.

INTEREST.

See Carriers, ⚷57, 94; Collision, ⚷130; Eminent Domain, ⚷148.

INTERNAL REVENUE

⚷42 (U.S.C.C.A.Va.) An automobile used in removing liquor on which the tax had not been paid, with intent to defraud the government of such tax, *held* subject to forfeiture under Rev. St. § 3450 (Comp. St. § 6352), providing for forfeiture of every "carriage or other conveyance whatsoever" used for such purpose, as against a mortgage taken by the seller of the machine who voluntarily gave possession to the purchaser, but who had no knowledge of its unlawful use.—U. S. v. One Saxon Automobile, 335.

INTOXICATING LIQUORS.

See Indians, ⚷38; Criminal Law, ⚷37.

VIII. CRIMINAL PROSECUTIONS.

⚷236(1) (U.S.C.C.A.Okl.) Evidence in a prosecution for introducing liquors into a prohibition state *held* sufficient to justify submission of the case to the jury.—Weems v. U. S., 269.

⚷236(15) (U.S.C.C.A.Ill.) In prosecution for unlawful sale of liquor to soldiers in uniform, testimony by the purchasers that they were in uniform, and reference to the purchasers as soldiers by other witnesses, who did not know them, is sufficient to warrant the jury in finding that they were in uniform when the purchases were made.—Goldstein v. U. S., 150.

JOINT TENANCY.

See Tenancy in Common.

JUDGES.

See Bankruptcy, ⚷230.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

⚷24 (U.S.C.C.A.Okl.) A "judicial act" is an act of a court or magistrate in deciding a question of right litigated before him or referred by law to his judgment.—U. S. v. Ward, 412.

JUDGMENT.

See Costs, ⚷70; Estoppel, ⚷68; Evidence, ⚷96.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

JUDICIAL SALES.

See Partition, ⚷19

JURY.

See Criminal Law, ⚷723.

II. RIGHT TO TRIAL BY JURY.

⚷37 (U.S.C.C.A.Ark.) Where, because of the erroneous exclusion of evidence offered by plaintiffs to prove the contract sued on, which rendered recovery impossible, they introduced no evidence on a second issue of fact, upon which they had a constitutional right to a jury trial, such issue cannot be determined by the appellate court to sustain a judgment for defendant entered upon a directed verdict.—Thorn v. Browne, 469.

LANDLORD AND TENANT.

See Carriers, ⚷32; Courts, ⚷297, 310, 312; Indians, ⚷16; Mines and Minerals, ⚷79; Parties, ⚷15; Railroads, ⚷133; States, ⚷9.

LEGISLATIVE POWER.

See Constitutional Law, ⚷62.

LIBEL AND SLANDER.

See Attorney and Client, ⚷102.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

⚷25 (U.S.C.C.A.Miss.) A casualty insurer's writing of a letter to a policy holder, setting out the grounds on which his claim was declined, and its delivery of the letter through its local attorney, the letter not being sealed, but open for the attorney's inspection, was privileged, though the contents of the letter were libelous, and there was no publication.—Sullivan v. Metropolitan Casualty Ins. Co. of New York, 72.

II. PRIVILEGED COMMUNICATIONS AND MALICE THEREIN.

⚷41 (U.S.C.C.A.Miss.) A casualty insurer's writing of a letter to a policy holder, setting out the grounds on which his claim was declined, and its delivery of the letter through its local attorney, the letter not being sealed, but open for the attorney's inspection, was privileged, though the contents of the letter were libelous, and there was no publication.—Sullivan v. Metropolitan Casualty Ins. Co. of New York, 72.

IV. ACTIONS.

(C) Evidence.

⚷112(1) (U.S.C.C.A.Miss.) In a policy holder's action for libel against a casualty insurer, evidence *held* not to justify finding that, when the insurer's attorney exhibited to a third person the insurer's libelous letter declining to pay the policy holder's claim, the attorney was interviewing the third person to get his statement in aid of the insurer's defense against the policy holder, so that the attorney's act in disclosing the letter was authorized, and constituted a publication.—Sullivan v. Metropolitan Casualty Ins. Co. of New York, 72.

LICENSES.

See Estoppel, ⚷68; Railroads, ⚷300.

LIENS.

See Bankruptcy, ⚷188, 387; Corporations, ⚷316; Injunction, ⚷108; Maritime Liens.

LIMITATION OF ACTIONS.

See Bankruptcy, ⚷328.

II. COMPUTATION OF PERIOD OF LIMITATION.

(H) Commencement of Action or Other Proceeding.

⚷127(11) (U.S.C.C.A.Iowa) Where plaintiff, having two causes of action, has stated but one of them in his original petition, although the amount demanded is large enough to cover both, an amendment setting up the second cause of action will not relate back to the date of the original petition, for the purpose of avoiding the bar of limitation, but will be governed by its own date.—Salyers v. U. S., 339.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚷180(7) (U.S.C.C.A.Iowa) Objection may be taken to an amendment to a petition, on the ground that it sets up a new cause of action barred by limitation, by motion to strike claim from the record and exclude it from consideration.—Salyers v. U. S., 339.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

⚷24(1) (U.S.C.C.A.Tex.) Where the timber on certain land had been inventoried as part of the estates of a lumber company and an oil company, involving which receivership suits were pending, and the timber was in the custody of the receiver, it could not be purchased from third person without notice on account of the lis pendens.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

MANUFACTURES.

See Contracts, ⚷116; Injunction, ⚷34; Trade-Marks and Trade-Names, ⚷45, 93.

MARITIME LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(B) Under Statutory Provisions.

⚷25 (U.S.C.C.A.Canal Zone) Act June 23, 1910, § 1 (Comp. St. § 7783), giving maritime liens to persons furnishing certain services to vessels, does not authorize a libel in rem against a vessel for breaching an entirely executory contract to remove her cargo.—The Rancagua, 189.

MARRIAGE.

See Equity, ⚷262.

⚷40(11) (U.S.C.C.A.Mo.) Where a contract of marriage is proved, the burden of proof rests upon the party contesting it to show that one of the parties was not qualified to enter into the contract by reason of an existing prior marriage.—Hamlin v. Grogan, 271.

⚷50(5) (U.S.C.C.A.Mo.) A contract of common-law marriage may be shown as an inference of fact from cohabitation, declarations of the parties, and reputation among friends and kindred.—Hamlin v. Grogan, 271.

MASTER AND SERVANT.

See Commerce, ⚷8, 27; Continuance, ⚷26; Railroads, ⚷281; Seamen, ⚷21, 23; Trial, ⚷253.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(B) Tools, Machinery, Appliances, and Places for Work.

⚷111(1) (U.S.C.C.A.Ill.) In the Safety Appliance Act (Comp. St. §§ 8605, 8613, 8617) it is implied that a railroad is liable in a private suit for an employé's injury or death resulting from a violation thereof.—Ross v. Schooley, 374.

⚷111(1) (U.S.C.C.A.Ohio) A railroad was negligent in hauling at the rear of a freight train, back of the caboose, a freight car, defective in that it had no drawbar or coupler on its rear end, an act unlawful under Act March 2, 1893, § 2 (Comp. St. § 8606), Act March 2, 1903, § 1 (Comp. St. § 8613), and Act April 14, 1910, § 5 (Comp. St. § 8622).—Erie R. Co. v. Schleenbaker, 617.

The effect of a railroad's violation of its duty under Act March 2, 1893, § 2 (Comp. St. § 8606), Act March 2, 1903, § 1 (Comp. St. § 8613), and Act April 14, 1910, § 5 (Comp. St. § 8622), in hauling at the rear of a freight train, back of the caboose, a freight car, defective, in that its rear end was without drawbar or coupler, and also any liability arising therefrom, extended to an employé, such as the conductor of the train.—Id.

(C) Methods of Work, Rules, and Orders.

⚷146 (U.S.C.C.A.Ky.) A rule of a mining company requiring operators of cutting machines to sound the roof of their working place before beginning work, and to prop it if evidence of weakness is found, may be waived by the company by employing a separate force to prepare safe places for the machines to work.—Consolidation Coal Co. v. Marcum, 371.

(E) Fellow Servants.

⚷185(27) (U.S.C.C.A.Mo.) Where plaintiff was at work under a car, which had been raised from its trucks and blocked up, his employer owed him a positive duty to warn him before the car was moved, which could not be delegated to another employé, so as to relieve itself from liability for its negligence resulting in plaintiff's injury.—American Car & Foundry Co. v. Rocha, 381.

(F) Risks Assumed by Servant.

⚷204(2) (U.S.C.C.A.Ohio) The purpose of Congress, through the Employers' Liability Act (Comp. St. §§ 8657–8665), and the Safety Appliance Acts (Comp. St. § 8605 et seq.), considered together, is not only to make a railroad's duty absolute, but also, where the injury is in part occasioned by the failure of the road to comply with the acts, to excuse employés from the effect alike of the rules of contributory negligence and assumption of risk.—Erie R. Co. v. Schleenbaker, 617.

(G) Contributory Negligence of Servant.

⚷228(2) (U.S.C.C.A.Ohio) The purpose of Congress, through the Employers' Liability Act (Comp. St. §§ 8657–8665) and the Safety Appliance Acts (Comp. St. § 8605 et seq.), considered together, is not only to make a railroad's duty absolute, but also, where the injury is in part occasioned by the failure of the road to comply with the acts, to excuse employés from the effect alike of the rules of contributory negligence and assumption of risk.—Erie R. Co. v. Schleenbaker, 617.

⚷240(1) (U.S.C.C.A.N.H.) A station employé of a railroad, who lost his footing and fell under the cars, was guilty of negligence in attempting to throw a bag of poultry in the open door of a baggage car traveling at the rate of 7 or 8 miles an hour.—Hustis v. Herbert, 162.

(H) Actions.

⚷278(18) (U.S.C.C.A.N.H.) In action for death of employé at a station, evidence *held* insufficient to sustain finding that railroad was negligent in starting the train, although there was a bag on a truck to be loaded on the express car.—Hustis v. Herbert, 162.

⚷285(7) (U.S.C.C.A.Ohio) In an action by a conductor, injured when he missed the grabiron on the caboose, from which the rear lights had been removed, and fell under the following car, on which the caboose lights had been placed; and which was at the rear of the train because it had no drawbar or coupler at its rear end, such hauling of the crippled car being unlawful under Act March 2, 1893, § 2 (Comp. St. § 8606), Act March 2, 1903, § 1 (Comp. St. § 8613), and Act April 14, 1910, § 5 (Comp. St. § 8622), and constituting negligence, question of whether the transportation of the defective car was the proximate cause of the conductor's injury *held* for the jury.—Erie R. Co. v. Schleenbaker, 617.

⚷286(19) (U.S.C.C.A.Ky.) Issues of negligence and contributory negligence, in an action by a coal miner against the employer for personal injury, *held* properly submitted to the jury.—Consolidation Coal Co. v. Marcum, 371.

⚷289(1) (U.S.C.C.A.Ky.) Issues of negligence and contributory negligence in an action by a coal miner against the employer for personal injury, *held* properly submitted to the jury.—Consolidation Coal Co. v. Marcum, 371.

MEXICO.

See Neutrality Laws, ⚷5.

MILEAGE.

See Admiralty, ⚷124.

MILITARY LAW.

See Army and Navy.

MILITIA.

See Conspiracy, ⚷48; Insurance, ⚷453, 455.

MINES AND MINERALS.

See Constitutional Law, ⚷46; Courts, ⚷310, 312; Estoppel, ⚷27, 47; Indictment and Information, ⚷108; Master and Servant, ⚷146, 286, 289; Perjury, ⚷36.

I. PUBLIC MINERAL LANDS.

(C) Patents.

⚷42 (U.S.C.C.A.Utah) A patent to coal land, issued to an entryman who, after filing his declaratory statement, but before making entry, conveyed the land, is not void, and its validity can be questioned only by the government.—Ketchum v. Pleasant Valley Coal Co., 358.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

⚷79(6) (U.S.C.C.A.Okl.) An oil and gas lease requiring quarterly payments of rental until development work was begun, but not providing for forfeiture, nor making time of its essence, *held* not forfeited by a slight delay in making a payment through mistake.—Aggers v. Shaffer, 42.

MONOPOLIES.

See Contracts, ⚷116.

MORTGAGES.

See Bankruptcy, ⚷163; Covenants, ⚷121.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

⚷25(3) (U.S.C.C.A.S.D.) The release of a guarantor from a valid contract of guaranty and the surrender to him of guaranteed notes to the amount of the mortgage *held* to constitute a valid consideration for his personal notes for a portion of the debt and a mortgage securing the same.—International Harvester Co. of America v. Patterson, 451.

MOTIONS.

See Continuance, ⚷7; New Trial, ⚷6; Trial, ⚷177.

MUNICIPAL CORPORATIONS.

See Bankruptcy, ⚷43; Charities, ⚷20, 23, 38; Collision, ⚷9, 73; Criminal Law, ⚷304, 1036; Perpetuities, ⚷4; Street Railroads.

MUNITIONS.

See Neutrality Laws, ⚷5.

MURDER.

See Homicide.

NAMES.

See Trade-Marks and Trade-Names, ⚷45, 59, 93, 100.

NATIONAL BANKS.

See Banks and Banking, ⚷253–257.

NATIONAL CONSCRIPTION ACT.

See Army and Navy, ⚷20; Criminal Law, ⚷97, 371, 406; Habeas Corpus, ⚷16; Perjury, ⚷9, 19; War, ⚷4.

NATIONAL DEFENSE ACT.

See Conspiracy, ⚷48.

NAVIGABLE WATERS.

See Courts, ⚷372; Wharves.

I. RIGHTS OF PUBLIC.

⚷1(1) (U.S.C.C.A.Ill.) The fact that shipping methods have dispensed with the necessity for using the carrying places in the Desplaines river does not lessen in any degree the value of the navigable portions of the stream, nor render them not navigable.—Economy Light & Power Co. v. U. S., 138.

Navigability does not depend on the amount of tonnage, depth of water, width of stream, character of craft, or relative ease or difficulty of navigation, nor the use at some time for commerce; navigability being determined by natural conditions.—Id.

⚷1(6) (U.S.C.C.A.Ill.) The Desplaines river in Illinois is a navigable stream, and a dam cannot be constructed therein without the consent of the United States government, under Act March 3, 1899, § 9 (Comp. St. § 9971).—Economy Light & Power Co. v. U. S., 138.

⚷3 (U.S.C.C.A.Ill.) The purposes of the Ordinance of July 13, 1787, for the government of the Northwest Territory, was to retain forever the free and unrestricted use to the people of the country of any or all waterways then known to be navigable, or waterways that might thereafter be used by the people in the more remote parts of the country for the purposes of commerce.—Economy Light & Power Co. v. U. S., 138.

⚷22(1) (U.S.C.C.A.Ill.) Under Act Sept. 19, 1890, providing that dams or other structures in navigable waters of the United States shall not be built without authority of the Secretary of War, and Act March 3, 1899, § 9 (Comp. St. § 9971), relating to navigable waters wholly within the state, dams or other structures may be built only by joint assent of the national and state governments.—Economy Light & Power Co. v. U. S., 138.

Act March 3, 1899, under which dams or other structures may be built in or over navigable streams wholly within a state only by joint assent of the national and state governments, should be construed to refer to navigable capacity and not rigidly restricted to streams floating interstate or foreign commerce at the time of its passage.—Id.

⚷24 (U.S.C.C.A.Mass.) Act March 3, 1899, § 15 (Comp. St. § 9920), requiring owners of craft sunken in navigable channels to mark their location, is a criminal statute, and the duty imposed does not arise until the owner receives knowledge that his vessel has been sunk.—Eastern S. S. Corporation v. Great Lakes Dredge & Dock Co., 3.

NEGLIGENCE.

See Appeal and Error, ⚷1039; Bailment, ⚷14; Banks and Banking, ⚷253, 254; Carriers; Collision, ⚷9, 73; Corporations, ⚷491; Master and Servant, ⚷111–289; Railroads, ⚷281–350; Shipping, ⚷166, 208, 209; Street Railroads, ⚷114; Wharves, ⚷20.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

⚷6 (U.S.C.C.A.Ill.) Every person for whose protection a statute sets up a particular standard of conduct is entitled to compensation for damages suffered through violation of that statute.—Ross v. Schooley, 374.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

⚷23(2) (U.S.C.C.A.Ohio) Petition against a railroad for death of a mother, who had crawled under its freight train standing on a track blocking a pathway to picnic grounds in order to rescue her three year old boy, who had previously crawled there, *held* not to state a case of attractive nuisance or of invitation.—Hodges v. Erie R. Co., 498.

IV. ACTIONS.

(C) Trial, Judgment, and Review.

⚷136(10) (U.S.C.C.A.Canal Zone) Refusing directed verdict in personal injury case is proper, where evidence as to negligence and contributory negligence is conflicting.—Panama R. Co. v. Pigott, 183.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEUTRALITY LAWS.

⚷5 (U.S.C.C.A.Tex.) Evidence that accused was taking some 2,000 rounds of ammunition on a mule toward a river crossing on the Mexican boundary, from which he was some 300 yards distant, etc., *held* to sustain conviction under Comp. St. §§ 7677, 7678, relating to transporting war munitions for export.—Sotello v. U. S., 67.

NEWSPAPERS.

See Criminal Law, ⚷371, 683; Indictment and Information, ⚷140, 150; War, ⚷4.

NEW TRIAL.

See Appeal and Error, ⚷110, 977; Criminal Law, ⚷1055; Trial, ⚷139.

I. NATURE AND SCOPE OF REMEDY.

⚷6 (U.S.C.C.A.Canal Zone) Both under Panama law and general principles, motion for

new trial is addressed to discretion of trial court.—Panama R. Co. v. Pigott, 183.

II. GROUNDS.

(F) Verdict or Findings Contrary to Law or Evidence.

⚷72 (U.S.C.C.A.Ohio) It was not the province of the trial court to weigh the evidence when passing on motion to direct verdict, but when he came to consider the motion for new trial he was required to weigh evidence.—Lake Erie & W. R. Co. v. Schneider, 625.

NOTES.

See Bills and Notes.

NOTICE.

See Banks and Banking, ⚷253; Corporations, ⚷542; Courts, ⚷292, 337; Criminal Law, ⚷1129; Estoppel, ⚷27, 93; Indians, ⚷16; Lis Pendens, ⚷24; Navigable Waters, ⚷24; Poisons, ⚷123; Principal and Surety, ⚷123; Shipping, ⚷208; States, ⚷9; Vendor and Purchaser, ⚷242.

NUISANCE.

See Negligence, ⚷23.

OATH.

See Indictment and Information, ⚷52; Perjury, ⚷9.

OFFICERS.

See Bankruptcy, ⚷163, 223; Banks and Banking, ⚷117, 118, 253, 254, 256, 257; Corporations, ⚷316; Courts, ⚷335; Criminal Law, ⚷369, 400, 402, 450, 723, 1169; District and Prosecuting Attorneys; Estoppel, ⚷88; Evidence, ⚷487, 543; Indians, ⚷16; Judges; Receivers; Waters and Water Courses, ⚷33.

OIL.

See Courts, ⚷312; Mines and Minerals, ⚷79; Taxation, ⚷168, 498.

PANAMA CANAL.

See Costs, ⚷108; Exceptions, Bill of, ⚷36; Railroads, ⚷5½, 281.

PANAMA RAILROAD COMPANY.

See Railroads, ⚷5½.

PARDON.

See Witnesses, ⚷360.

PARENT AND CHILD.

See Railroads, ⚷344, 350.

PARTIES.

See Courts, ⚷310; Equity, ⚷103.

For parties on appeal and review of rulings as to parties, see Appeal and Error.

For parties to particular proceedings or instruments, see also the various specific topics.

I. PLAINTIFFS.

(B) Joinder.

⚷15 (U.S.C.C.A.Pa.) Where one of two joint lessors sues alone improperly in equity without joining his colessor, joinder in his bill of his independent legal cause of action for an indebtedness from defendant lessee to him alone, even if proper, cannot convert the inseparable rights of himself and his colessor into separate rights, justifying his suit without joining his colessor.—Himes v. Schmehl, 281.

⚷19 (U.S.C.C.A.Pa.) Where a contract is joint, and not several, all the joint obligees or covenantees who are alive must be joined as plaintiffs.—Himes v. Schmehl, 281.

PARTITION.

II. ACTIONS FOR PARTITION.

(A) Right of Action and Defenses.

⚷19 (U.S.C.C.A.Canal Zone) Bill for partition or sale for division. even if it can be made the means of trying a disputed title, cannot be maintained, possession not being in any of the parties, but in the government under a claim of right.—Reina v. Bracho, 180.

PARTNERSHIP.

See Bankruptcy, ⚷166; Courts, ⚷264.

PATENTS.

See Estoppel, ⚷68.

II. PATENTABILITY.

(A) Invention.

⚷26(1) (U.S.C.C.A.Minn.) A new combination of old elements whereby an old result is obtained in a more facile, economical, and efficient way is as securely protected by a patent as is a new machine or composition of matter, provided the discovery and reduction to practice of the novel combination rose above the reach of the skill of the mechanic trained in the art.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Barnett & Record Co., 386.

(D) Anticipation.

⚷53 (U.S.C.C.A.Minn.) The mere conception of an invention and the drawing of plans and sketches thereof does not constitute one an inventor for the purpose of anticipating a later patent to another.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Barnett & Record Co., 386.

⚷66 (U.S.C.C.A.Minn.) That prior patents separately disclosed one or more of the elements of a later patent, while no one of them disclosed them all, does not necessarily establish anticipation by any of them.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Barnett & Record Co., 386.

⚷69 (U.S.C.C.A.N.Y.) A publication that another firm had sent out a catalogue of a silent gear made of fiber of prepared cotton is too vague to enable an expert to carry the device into practical use, and does not invalidate a subsequent patent for a gear made of compressed cotton fibers.—General Electric Co. v. Continental Fibre Co., 54.

(E) Prior Public Use or Sale.

⟹75 (U.S.C.C.A.N.Y.) The use of a number of gears made of compressed cotton fibers in a plant where the inventor of such gears was employed for experiment, and to convince skeptical superiors of their merit, is not a public use which will defeat the right to a patent on an application filed more than two years after the first gear was constructed, but less than one year after such gears were on the market.—General Electric Co. v. Continental Fibre Co., 54.

IV. APPLICATIONS AND PROCEEDINGS THEREON.

⟹102 (U.S.C.C.A.Ind.) Claims 40 and 41 of the Green patent, No. 1,180,030, inserted after the original application on request of the examiner for the purpose of interference, were within the drawings and specifications of the original application, so that no additional verification thereto was necessary.—Taggart Baking Co. v. Green, 299.

⟹110 (U.S.C.C.A.N.Y.) An application for a patent for gears made of compressed textile material, the specific material used being cotton batting, describes the same invention as a prior pending application describing the material as compact layers of textile fibers; and, there being no showing of their intention to abandon the original invention, the subsequent application can be treated as a continuation of the former.—General Electric Co. v. Continental Fibre Co., 54.

VIII. DISCLAIMERS.

⟹149 (U.S.C.C.A.Ohio) The owner of a patent, if it be held in his suit for infringement that the claims in suit are too broad, cannot be given relief on filing necessary disclaimer in the Patent Office, where, if limited to the application of the three first features in the patent relied upon by plaintiff, another feature not employed by defendant's device would still remain, while, if made to include a construction of the claims in accordance with plaintiff's interpretation of the distinguishing fourth feature relief would be inequitable as converting into infringement acts otherwise innocent.—Kellogg Switchboard & Supply Co. v. Dean Electric Co., 465.

⟹155 (U.S.C.C.A.Ill.) A claimant of a generic invention does not lose his right by declining to claim some other person's subsequently devised form.—Standard Scale & Supply Co. v. Cropp Concrete Machinery Co., 60.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(A) In General.

⟹157(2) (U.S.C.C.A.Minn.) It is one of the fundamental rules for the interpretation of contracts and grants, especially applicable to grants of patents, that in case of doubt or ambiguity that construction should be preferred which sustains and vitalizes, rather than that which strikes down and paralyzes.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Barnett & Record Co., 386.

(B) Limitation of Claims.

⟹174 (U.S.C.C.A.Minn.) When a patentee has plainly described and claimed his improvements or combinations, he has the right to every use to which they can be applied, and to every way in which they can be utilized, whether or not he was aware of them when he secured his patent.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Barnett & Record Co., 386.

⟹177 (U.S.C.C.A.Minn.) When a patentee has plainly described and claimed his combinations, he has the right to every use to which they can be applied, and to every way in which they can be utilized, whether or not he was aware of them when he secured his patent.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Barnett & Record Co., 386.

⟹177 (U.S.C.C.A.Ohio) A part which is clearly made an essential element of a combination claim by the patentee must be given effect as a limitation, although in actual use of the machine it proved unimportant.—Firestone Tire & Rubber Co. v. Seiberling, 286.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Assignments and Other Transfers.

⟹202(1) (U.S.C.C.A.Ill.) Where one, who was no novice in the patent business, assigned an application for a patent, no fine line will be drawn in his favor, as against the assignee, between claims as allowed and those originally made upon the description and drawings.—Foltz Smokeless Furnace Co. v. Eureka Smokeless Furnace Co., 193.

⟹202(2) (U.S.C.C.A.Ill.) The assignor of an application for a patent is estopped, as against the assignee, from questioning the validity of a patent, application for which subsequently eventuates in a patent, as to claims within the scope of the original disclosure, though not made in the application as filed.—Foltz Smokeless Furnace Co. v. Eureka Smokeless Furnace Co., 193.

XII. INFRINGEMENT.

(A) What Constitutes Infringement.

⟹226 (U.S.C.C.A.N.Y.) If a patent claim reads upon an offending apparatus infringement is suggested although not proved, but there is no infringement if the claim will not read upon that which is said to infringe.—Geoghegan v. Ernst, 64.

⟹243 (U.S.C.C.A.Minn.) When the advance toward the desideratum is gradual, and several inventors formed different combinations, which accomplished the result sought with varying degrees of success, each is entitled to his own combination, as long as it differs from those of his competitors and does not include theirs.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Barnett & Record Co., 386.

(C) Suits in Equity.

⟹288 (U.S.C.C.A.N.Y.) Evidence *held* insufficient to show that a jobber handling defendant's article, which it was claimed infringed plaintiff's patent, was defendant's agent within Judicial Code, § 48 (Comp. St. § 1030), authorizing service upon the infringer's agent in

certain cases.—Stryker Deflector Co. v. Perrin Mfg. Co., 50.

If jobbers forwarded orders to their principal in another state and the goods were shipped direct by the principal, the sale is consummated outside the state, and there is no patent infringement within the district under Judicial Code, § 48 (Comp. St. § 1030), conferring jurisdiction in districts where the infringement is committed.—Id.

⚷324(5) (U.S.C.C.A.Minn.) Where a patent has been granted and sustained by a trial court, the legal presumption is that the decisions of the Patent Office and the court in an infringement case, were right, and they may not lawfully be reversed by an appellate court, unless there is clear and convincing proof in the record that they have made some serious mistake of fact or fallen into fatal error of law.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Barnett & Record Co., 386.

⚷327 (U.S.C.C.A.Iowa) The sustaining of a patent upon a differentiation from the prior art does not authorize the successful party to gather to himself a monopoly of what was old when he entered the field.—T. L. Smith Co. v. Cement Tile Machinery Co., 463.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

⚷328

UNITED STATES.

ORIGINAL.

705,042. Improved fire escape, claims 1 and 2, held infringed; claim 3, held not infringed, 307.
762,561. Machine for making casings for automobile tires, claim 1, held limited and not infringed; claims 2 and 14 held invalid, 286.
779,533. Harmonic calling means in telephone systems, held not infringed, 465.
790,776. Conveyer, claims 7 and 8, held void, 398.
790,811. Elevator for packages, claims 1, 2, 3, 10, and 11, held not anticipated and valid, 398.
803,721. Improvements in concrete mixers, construed, and held not infringed, 463.
896,233. Working elevator, held not anticipated, valid and infringed, 386.
941,962. Machine for making casings for automobile tires, held invalid, 286.
947,196. Concrete mixer, claims 1, 2, 3, 4, 7, 9, 12, 13, 14, and 16, held valid and infringed, 60.
1,025,420. Revolving clod fender held not anticipated, valid, and infringed, 402.
1,038,146. Meter box, held void, 407.
1,039,210. Sharpening device for meat-slicing machine, held not infringed, 305.
1,061,770. Compressed fibre gear, held valid and infringed, 54.
1,148,128. Electric light deflectors, claims 1 and 2, held valid and infringed, 50.
1,170,193. Hoisting apparatus, claims 1, 2, and 3, held valid, but not infringed, 64.
1,180,030. Biscuit cutter, claims 29, 30, 40–45, held valid, and infringed, 299.

REISSUED.

12,159. Power loom, held void, 405.
13,398. Note sheet guide, held valid and infringed, 195.

PAYMENT.

See Bankruptcy, ⚷165, 166, 326, 345; Banks and Banking, ⚷117, 118; Bills and Notes, ⚷434; Brokers, ⚷54; Carriers, ⚷38, 58; Corporations, ⚷228; Costs, ⚷251; Eminent Domain, ⚷148; Evidence, ⚷96; Mines and Minerals, ⚷79; Principal and Surety, ⚷162; Sales, ⚷79, 82, 88, 174, 202, 218½; Seamen, ⚷23.

I. REQUISITES AND SUFFICIENCY.

⚷22 (U.S.C.C.A.N.Y.) Accepting a buyer's check does not ordinarily operate as payment, so as to prevent the seller from retaking the goods, if the check is not paid.—In re Perpall, 104.

PERJURY.

See Constitutional Law, ⚷46; Indictment and Information, ⚷108.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

⚷9(2) (U.S.C.C.A.Cal.) Under the Selective Service Regulations, published November 8, 1917, pages 7 to 14, associate member of the legal advisory draft board of a county in California *held* to have had authority to administer to a registrant an oath on the occasion of such registrant's verifying his questionnaire as to the details of persons dependent upon him, as a wife.—Hardwick v. U. S., 509.

⚷9(2) (U.S.C.C.A.Cal.) Under Selective Service Regulations 1917, §§ 91, 94, 95, a registrant who swore to the affidavit verifying his questionnaire, which falsely stated that he had a wife dependent on him for support, committed perjury, despite his claim that there is no statute authorizing such an oath, and no authorization by the regulations.—Whiteside v. U. S., 513.

II. PROSECUTION AND PUNISHMENT.

⚷19(2) (U.S.C.C.A.Cal.) Where the indictment, charging defendant with having unlawfully, improperly, and fraudulently endeavored to obtain the allowance of his application for exemption and discharge from the selective service draft on the ground that he had a dependent wife, charged that he willfully and falsely stated in the affidavit to his questionnaire that he had a wife dependent on his labor for support, etc., such indictment was not defective because failing to aver that the wife was mainly dependent for support on defendant's labor.—Hardwick v. U. S., 509.

⚷19(2) (U.S.C.C.A.Cal.) Indictment for perjury by having sworn falsely that defendant, a registrant under the Selective Service Act (Comp. St. 1918, § 2044a et seq.), had a wife dependent on him for support, *held* sufficient in its charge that defendant was the person who

subscribed and took the affidavit.—Whiteside v. U. S., 513.

⚷36 (U.S.C.C.A.Alaska) In a prosecution for making false affidavits as to annual assessment work on a placer claim, in violation of the Alaska law, *held* that, while the evidence for the prosecution, standing alone, would be insufficient to sustain a conviction, yet, in connection with discrepancies of defendant's own testimony, denial of his motion for instructed verdict was proper.—Vedin v. U. S., 534.

PERPETUITIES.

See Charities, ⚷38.

⚷4(4) (U.S.C.C.A.Ill.) Mere request, in will making devise for support of a school in a city, that the city keep testator's family burial lot in repair, imposes no obligation, much less creates a perpetuity, and so does not affect validity of charitable gift.—Laswell v. Hungate, 29.

PHYSICIANS AND SURGEONS.

See Conspiracy, ⚷48; Criminal Law, ⚷371, 472; Insurance, ⚷453, 455; Poisons, ⚷4, 9.

PLEADING.

See Courts, ⚷276, 405; Equity, ⚷262; Estoppel, ⚷3; Evidence, ⚷272; Limitation of Actions, ⚷127, 180.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

⚷34(3) (U.S.C.C.A.Ill.) Assuming that Rev. Codes Mont. § 3850, making directors of a corporation liable for debts of the corporation if they do not file certain reports, applies to foreign corporations, in a proceeding against directors of a foreign corporation for not filing such reports in Montana, it must be specifically alleged that the debt was incurred in Montana, inasmuch as a judgment rendered in Montana on a debt raises no presumption that the debt was there incurred.—Stark Bros.' Nurseries & Orchards Co. v. Little, 461.

V. DEMURRER OR EXCEPTION.

⚷218(4) (U.S.C.C.A.Ohio) Dismissal of action against railroad for a death on its track, on sustension of its demurrer to plaintiff's petition, *held* erroneous; it not being clear that a good cause of action could not be stated by amendment.—Hodges v. Erie R. Co., 498.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⚷236(5) (U.S.C.C.A.Iowa) Allowance of an amendment during trial, to conform the pleadings to the proof, is discretionary with the trial court.—Salyers v. U. S., 339.

⚷248(4) (U.S.C.C.A.Iowa) Where plaintiff in the original petition on contractor's bond set up a claim for material furnished by him to a contractor, an amendment setting up a further claim for material furnished by another and assigned to him states a new and separate cause of action, although the amount prayed for in the original petition was large enough to cover both claims.—Salyers v. U. S., 339.

PLEDGES.

See Warehousemen, ⚷15.

POISONS.

See Conspiracy, ⚷48; Criminal Law, ⚷371, 472, 1177, 1186; Indictment and Information, ⚷110, 111; Insurance, ⚷530.

⚷2 (U.S.C.C.A.Mich.) The administrative provisions of Harrison Narcotic Drug Act, § 1 (Comp. St. § 6287g), relating to taxation and registration, are valid.—Stetson v. U. S., 639.

⚷4 (U.S.C.C.A.Mich.) "Preparations and remedies," contained in Harrison Narcotic Drug Act, § 6 (Comp. St. § 6287*l*), *held* not to include clear morphine, but to relate to actual medicinal preparations and remedies not containing more than a quarter of a grain of morphine, remedies such as a physician or druggist would normally dispense.—Stetson v. U. S., 639.

Harrison Narcotic Drug Act, § 8 (Comp. St. § 6287n), applies to the business of selling narcotic drugs as distinct from mere possession.—Id.

⚷9 (U.S.C.C.A.Mich.) In a prosecution for violation of the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), defendant not being charged as a physician or a druggist, and the indictment not negativing the exception of section 6 of the act (Comp. St. § 6287*l*), it was open to him to show he was merely dispensing medicinal preparations and remedies containing not more than the amount of morphine permitted by section 6.—Stetson v. U. S., 639.

⚷9 (U.S.C.C.A.Tex.) An indictment charging violation of the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), which averred that defendant at the time of the offense knew that cocaine was a derivative of coca leaves, and that morphine and heroin were salts and derivatives of opium, sufficiently averred by implication the fact that cocaine was a derivative of such leaves, and that morphine and heroin are salts or derivatives of opium.—Melanson v. U. S., 129.

In prosecutions for violating and conspiracy to violate the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), evidence in one case *held* sufficient to show the drugs, cocaine, morphine, and heroin, are salts and certainly derivatives of coca leaves or opium, and, in the second case, sufficient to authorize submission of the issue to the jury.—Id.

In prosecution of physicians for sale of drugs in violation of Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), whether dispensing of drug in each case was a dispensing of it by a physician to a patient, in which case no order form was required, or whether the form of prescription was used by defendants as an evasion of the law, and not in good faith, in which case the dispensing would be a sale, and an order form necessary to bring it within the law, *held* for the jury.—Id.

In prosecution of physicians for having violated the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), whether two persons were consumers of the drug and not patients of defend-

ants, and whether defendants and the druggists on whom they issued prescriptions, their co-defendants, knew the true character in which such persons sought to procure drugs, *held* for the jury.—Id.

In prosecution of physicians for having violated and conspired to violate the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), the trial court in his general charge properly submitted an issue as to the good faith of defendants in issuing their prescriptions to supposed patients, since the defendants could only protect themselves if the prescriptions were issued legitimately in their practice.—Id.

POST OFFICE.

See Bribery, ⚷11; Conspiracy, ⚷47; Criminal Law, ⚷1170½.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRESCRIPTION.

See Limitation of Actions.

PRESIDENT.

See Criminal Law, ⚷369.

PRICE.

See Injunction, ⚷34.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Carriers, ⚷71; Criminal Law, ⚷406; Patents, ⚷288; Reformation of Instruments, ⚷30.

PRINCIPAL AND SURETY.

See Bankruptcy, ⚷230; Drains, ⚷49; Guaranty; Witnesses, ⚷244, 255.

III. DISCHARGE OF SURETY.

⚷123(1) (U.S.C.C.A.Miss.) The contract requirement of exertion by contractor of all reasonable diligence and activity being for the benefit of the obligee on the contractor's bond, the obligee, by failing to treat a less amount of diligence as a default, waived it, and was not required to give the surety notice thereof; it not being in such case a "default" within the meaning of the contract.—Equitable Surety Co. v. Board of Com'rs of Muddy Bottom Swamp Land Dist. No. 1, Tippah County, Miss, 119.

IV. REMEDIES OF CREDITORS.

⚷145(1) (U.S.C.C.A.Miss.) In action on surety's bond, judgment against principal for breach of contract is admissible as prima facie evidence of principal's default, even against surety.—Equitable Surety Co. v. Board of Com'rs of Muddy Bottom Swamp Land Dist. No. 1, Tippah County, Miss., 119.

⚷151 (U.S.C.C.A.Miss.) Ordinarily obligee on bond is proper party to enforce it.—Equitable Surety Co. v. Board of Com'rs of Muddy Bottom Swamp Land Dist. No. 1, Tippah County, Miss., 119.

Surety, receiving a premium, is estopped to deny obligee's capacity to sue for breach of bond.—Id.

⚷162(2) (U.S.C.C.A.Miss.) In action on surety's bond, evidence that surety's manager construed contract as authorizing payment of disputed item to contractor, etc., *held* to make a jury question whether such payment was authorized by contract.—Equitable Surety Co. v. Board of Com'rs of Muddy Bottom Swamp Land Dist. No. 1, Tippah County, Miss., 119.

In action on surety's bond, evidence that consideration named in drainage contract was subject to discount under another contract, etc., made a jury question whether plaintiff made a material false representation to defendant surety that contractor would receive amount stated in original contract.—Id.

In action on a surety's bond, conflicting evidence *held* to make jury question whether plaintiff falsely represented to defendant surety that bond was to cover additional work, for which contractor would receive additional pay.—Id.

V. RIGHTS AND REMEDIES OF SURETY.

(B) As to Principal.

⚷185 (U.S.C.C.A.Va.) The right of a surety on a bail bond to recover out of an indemnity fund provided by the principal his reasonable expenses in defending a suit on the bond does not extend to costs and fees expended in defending against a supplementary proceeding by the government to collect the judgment.—Leary v. U. S., 330.

A deposit of securities to indemnify the surety on a bail bond carries an implied warranty of title, but not that the title will not be questioned, and the surety is not entitled to charge the fund with the expense of successful litigation in defending his title as against his adversary, which was adjudged owner of the securities subject to his claim, whether the litigation is conducted by himself or the depositary.—Id.

PROCESS.

See Appeal and Error, ⚷397; Appearance, ⚷20.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

⚷9 (U.S.C.C.A.Tex.) In suit by receiver of an oil company and a lumber company against another lumber company for the timber on certain lands, evidence *held* sufficient to authorize finding that title at the time of institution of the suit was in plaintiff lumber company and the oil company.—Keith Lumber Co. v. Hous-Oil Co. of Texas, 213.

PROSTITUTION.

See Aliens, ⚷54.

⚷5 (U.S.C.C.A.Iowa) Evidence in a prosecution for violation of the White Slave Traffic Act (Comp. St. § 8812) *held* sufficient to war-

rant submission of the case to the jury.—Nokis v. U. S., 453.

PUBLIC LANDS.

See Constitutional Law, ⚷46; Drains, ⚷49; Ejectment, ⚷100; Estoppel, ⚷27, 47; Evidence, ⚷342; Indictment and Information, ⚷108; Mines and Minerals, ⚷42; Perjury, ⚷36.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(K) Remedies in Cases of Fraud, Mistake, or Trust.

⚷120 (U.S.C.C.A.Neb.) The United States *held* entitled to cancellation of patents for soldiers' homesteads which were taken by the entrymen under contracts to convey to another, who paid all expenses and the agreed price on conveyance after final proof.—Eldred v. U. S., 270.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads.

QUIETING TITLE.

See Equity, ⚷262.

RAILROADS.

See Appeal and Error, ⚷1064; Carriers; Continuance, ⚷26; Courts, ⚷297; Death, ⚷58; Master and Servant, ⚷111, 204, 228, 240, 278, 285; Pleading, ⚷218; Street Railroads; Trial, ⚷253.

I. CONTROL AND REGULATION IN GENERAL.

⚷5½ [New, vol. 6A Key-No. Series] (U.S.C.C.A.Canal Zone) Since Act June 25, 1910, Act Aug. 24, 1912, § 6 (Comp. St. § 10042), and other statutes and regulations and rulings, indicate an intention to preserve the corporate existence of the Panama Railroad Company, though the government owns all its stock, that corporation may be sued by a private individual for injuries caused by the negligence of its employés.—Panama R. Co. v. Curran, 114.

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

⚷133 (1) (U.S.C.C.A.Neb.) In a lease of land by a railroad company to a smelting company as site for a plant, reserving to lessor all tracks thereon, a provision by which lessor agreed to furnish material and lay all further tracks required by lessee, "and do all switching of its cars within its premises necessary in placing the same for loading and unloading freight or material therefor free of charge to said smelting company," *held* not to limit such free switching service to that of cars for actual load hauls from or to the plant, especially in view of a contrary practical construction by the parties during 30 years.—American Smelting & Refining Co. v. Union Pac. R. Co., 83.

X. OPERATION.

(D) Injuries to Licensees or Trespassers in General.

⚷281(1) (U. S. C. C. A. Canal Zone) Evidence that employés of the Panama Railroad Company oiled the floor of a commissary operated by it, so as to make it dangerously slippery, as a result of which a customer was injured, establishes negligence for which the corporation was liable, under the law of the Canal Zones.—Panama R. Co. v. Curran, 114.

⚷281(1) (U.S.C.C.A.Canal Zone) Under the Panama laws, a railroad is liable for personal injuries caused by negligence of its employés.—Panama R. Co. v. Pigott, 183.

(F) Accidents at Crossings.

⚷300 (U.S.C.C.A.Ohio) Though a pathway across a railroad's track to a picnic ground was a private way, where the public was licensed to use it in crossing the tracks, a duty arose on the railroad to exercise reasonable care to avoid injury to those whose presence there reasonably might be anticipated.—Hodges v. Erie R. Co., 498.

⚷327(7) (U.S.C.C.A.Ohio) The owner and driver of a motor truck along a good road, so that the truck was not noisy, in approaching a single-track railroad crossing, was not required as a matter of law to stop to avoid the implication of negligence contributing to his injuries, when struck by a special train running at an unusual time; the view not being so obstructed as to require plaintiff to stop.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷344(3) (U.S.C.C.A.Ohio) Petition against a railroad for death of a mother, who crawled under a freight train standing on a track where it blocked a pathway to picnic grounds, in an attempt to rescue her three-year old son, who had crawled under the train before her, *held* not to state a case of actionable negligence on the railroad's part.—Hodges v. Erie R. Co., 498.

⚷346(2) (U.S.C.C.A.Ohio) In the federal courts, the burden to prove the defense of contributory negligence rests upon defendant in a suit for injuries at a crossing.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷350(1) (U.S.C.C.A.Ohio) In an action against a railroad for a death on its track at a crossing, withdrawal from the jury of the question of the railroad's negligence *held* erroneous, in view of the testimony.—Robbins v. Pennsylvania Co., 621.

⚷350(1) (U.S.C.C.A.Ohio) In an action against a railroad for injuries to a motor truck owner and driver at a crossing, questions of the railroad's negligence and its effect in producing the accident *held* for the jury.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷350(13) (U.S.C.C.A.Ohio) In an action against a railroad for a death on its track, question of decedent's contributory negligence *held* for the jury.—Robbins v. Pennsylvania Co., 621.

⚷350(13) (U.S.C.C.A.Ohio) In an action against a railroad for injuries at a crossing to the owner and driver of a motor truck, question of plaintiff's contributory negligence *held*

for the jury.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷350(14) (U.S.C.C.A.Ohio) A three year old child is not as a matter of law guilty of negligence in passing under a standing freight train, blocking the pathway to picnic grounds much used by children.—Hodges v. Erie R. Co., 498.

⚷350(31) (U.S.C.C.A.Ohio) It is not negligence per se for a mother voluntarily to risk her own life in attempting to rescue her child, who had crawled under a standing freight train blocking a path to picnic grounds.—Hodges v. Erie R. Co., 498.

REAL ACTIONS.

See Ejectment; Partition.

RECEIVERS.

See Lis Pendens, ⚷24; Property, ⚷9; Vendor and Purchaser, ⚷244.

VI. ACTIONS.

⚷178 (U.S.C.C.A.Tex.) Lumber company *held* not a necessary party to suit ancillary to receivership proceedings by receiver of oil company against a second lumber company for the timber on certain land as to which the first lumber company had a stumpage contract, which did not place ownership of the timber in it.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

VII. ACCOUNTING AND COMPENSATION.

⚷204 (U.S.C.C.A.Tex.) Decree discharging receivers of lumber company and an oil company, and turning their properties over to the companies under recited terms, did not destroy the jurisdiction of the court, which had previously attached, over an ancillary suit by the receiver of the oil company against a second lumber company, which had been made a party to the receivership suit by an amended bill.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

RECORDS.

See Appeal and Error, ⚷684–709, 758; Bankruptcy, ⚷188; Courts, ⚷292; Criminal Law, ⚷1090; Evidence, ⚷332, 342; Habeas Corpus, ⚷25; Poisons, ⚷2; Vendor and Purchaser, ⚷242.

RED CROSS.

See Criminal Law, ⚷683.

REFERENCE.

See Bankruptcy, ⚷223, 224, 230, 415, 467.

REFORMATION OF INSTRUMENTS.

See Action, ⚷68; Insurance, ⚷143.

I. RIGHT OF ACTION AND DEFENSES.

⚷16 (U.S.C.C.A.Okl.) Where both parties to a deed believed that the grantor owned only a one-half interest in the land, and the grantee informed the grantor, who could not read English, that the deed conveyed only a one-half interest, the grantor is entitled to relief against the deed, which in terms conveyed the entire interest in the land.—Barnett v. Kunkle, 38.

⚷17(1) (U.S.C.C.A.Okl.) A mutual mistake as to the interest of the grantor in the land is a mistake of fact, not of law, though induced by a mistaken view of the law.—Barnett v. Kunkle, 38.

⚷20 (U.S.C.C.A.Okl.) Where an Indian, who could not read English, mistakenly believed that he had only a one-half interest in the land conveyed, and was confirmed in that belief by statements of the grantee, equity will grant relief to the grantor from a deed conveying the entire estate.—Barnett v. Kunkle, 38.

II. PROCEEDINGS AND RELIEF.

⚷30 (U.S.C.C.A.Mich.) If the agent of a burglary insurer and the insured storekeeper or his agent so misunderstood each other that their minds never met as regards the extent of the store's burglary alarm equipment, or if agent of insurer through mistake or designedly misinformed insurer as to extent of such equipment, or undertook without authority to waive failure of the storekeeper to connect his safe with a burglary alarm system, correction of the policy as issued cannot be obtained at law, but must be sought in equity, after which the actual contract as then determined can be enforced.—Prudential Casualty Co. v. Miller, 458.

RELATION BACK.

See Indians, ⚷16.

RELEASE.

See Bankruptcy, ⚷165; Courts, ⚷264; Mortgages, ⚷25.

REPORTS.

See Corporations, ⚷640; Pleading, ⚷34.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error.

RIOT.

See Criminal Law, ⚷814.

RISKS.

See Master and Servant, ⚷204.

RULES OF COURT.

See Court Rules Cited.

SAFETY APPLIANCE ACT.

See Commerce, ⚷8, 27; Master and Servant, ⚷111, 204, 228.

SALES.

See Bankruptcy, ⚷165, 340; Banks and Banking, ⚷253; Brokers, ⚷85; Carriers, ⚷25, 58, 71; Champerty and Maintenance, ⚷6; Conspiracy, ⚷48; Contracts, ⚷

116; Corporations, ⚷376, 542; Estoppel, ⚷68, 72; Evidence, ⚷69; Frauds, Statute of, ⚷115, 116; Injunction, ⚷34; Patents, ⚷288; Payment, ⚷22; Poisons, ⚷ 4, 9; Trade-Marks and Trade-Names, ⚷ 100; Vendor and Purchaser.

II. CONSTRUCTION OF CONTRACT.

⚷54 (U.S.C.C.A.Cal.) As a rule, the parties to mercantile agreements, as contracts of sale between dealers, are held to have intended to make time the essence of the contract.—Ackerman v. Santa Rosa-Vallejo Tanning Co., 409.

⚷54 (U.S.C.C.A.La.) A company which sold lumber to a railroad, contracting to supply it "f. o. b." its rails, had the right to accept and act on a practical construction of the contracts as to the meaning of the letters by the railroad. —Brooks-Scanlon Co. v. Illinois Cent. R. Co., 319.

⚷79 (U.S.C.C.A.La.) Where the application of the facts to the expression "f. o. b.," used in a contract of sale, was a matter of doubt and controversy, it was a proper subject for an understanding between the parties, and, such an understanding having been reached, it was not in conflict with the effect of the letters, but merely defined the application of the expression.—Brooks-Scanlon Co. v. Illinois Cent. R. Co., 319.

Where a company, which sold lumber to a railroad "f. o. b." its rails, made its prices with reference to the railroad's practical construction of the contract, in relation to such letters, by payment of the lumber company's bill without deduction of payments made by a division of the railroad, and such construction was followed thereafter, the railroad cannot recover back part of the payments made on the ground that the construction was erroneous. —Id.

⚷82(1) (U.S.C.C.A.Cal.) A contract for the sale of leather backs, reading, as to payment, "2%—30 days f. o. b. Vallejo," required payment within 30 days of the date of shipment from the seller's tannery, and, if paid sooner, called for a deduction of 2 per cent.—Ackerman v. Santa Rosa-Vallejo Tanning Co., 409.

⚷87(3) (U.S.C.C.A.La.) Evidence *held* to warrant jury in finding that letters "f. o. b." were accepted by both parties as referring alone to charges connected with handling and loading the sold lumber at shipping point, and as not having reference to charges conditional in character and the existence of which resulted from the subsequent action of the buyer railroad.—Brooks-Scanlon Co. v. Illinois Cent. R. Co., 319.

⚷88 (U.S.C.C.A.La.) In a railroad's action to recover from the seller an excess, paid under a contract whereby lumber was purchased "f. o. b." its rails, issue as to the understanding of the parties regarding the meaning of the expression "f. o. b." *held* for the jury under the evidence.—Brooks-Scanlon Co. v. Illinois Cent. R. Co., 319.

In an action by a railroad to recover from a lumber company alleged overpayments on purchases of lumber, issue of estoppel of the railroad to claim any overpayment, on the ground that it had practically construed the contracts between the parties, *held* to be submitted to the jury for determination.—Id.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

⚷174 (U.S.C.C.A.Cal.) Where the seller of leather backs shipped an installment in accordance wtih the contract, and three days after payment for the installment was due the buyers announced their intention to continue to hold back payment until the order was completed, the seller had a right to stand on the terms of the contract and refuse performance until the buyers themselves performed, and the latter, having failed to comply with the terms of payment, cannot insist the seller should have proceeded and completed the contract in the manner specified.—Ackerman v. Santa Rosa-Vallejo Tanning Co., 409.

⚷179(4) (U.S.C.C.A.Cal.) Delayed acceptance by the buyers of goods once rejected was a waiver of defects and of contract requirements as to quality of the merchandise.—Ackerman v. Santa Rosa-Vallejo Tanning Co., 409.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

⚷202(8) (U.S.C.C.A.N.Y.) An apparently unrestricted delivery of goods sold for cash presumably waives the condition that payment is necessary to pass title.—In re Perpall, 104.

The seller of a bond did not waive payment as a condition precedent to passing title, where his messenger delivered the bond to a broker and another messenger according to the usual business custom, called to receive payment a few hours later, after allowing time for the broker to make entries, execute a check, etc. —Id.

⚷218½ (U.S.C.C.A.N.Y.) Evidence that the seller's messenger delivered a bond to a broker, and that another messenger called for the purchase price within a few hours after giving the broker time to make the check according to the usual business custom, *held* to sustain a finding that title did not pass until payment.—In re Perpall, 104.

Whether the condition that payment is required to pass title to goods sold has been waived is a jury question, especially where the rights of third parties have not intervened.—Id.

IX. CONDITIONAL SALES.

⚷464 (U.S.C.C.A.Ohio) Gen. Code Ohio, § 8570, imposes a limitation only on the right of a conditional seller to retake the property on default, and was not intended to vitiate the contract, but merely to protect the purchaser.—Burroughs Adding Mach. Co. v. Dial, 531.

Conditional sale contracts are valid at common law, and, in the absence of an Ohio statute declaring such contracts, made in the state, illegal, or declaring it an offense either to make or attempt to enforce such conditional contracts, except under circumstances not existing in the present case, the Circuit Court of Appeals cannot hold that such an Ohio contract is illegal. —Id.

⚷484 (U.S.C.C.A.Ohio) Where it does not appear that on attempting to retake possession of property conditionally sold, or otherwise, the seller had violated Gen. Code Ohio, § 8570, nor any law of Ohio, section 12464, providing that a seller who violates any of the provisions of

law, in taking possession or repossession of the property, shall be fined, is not applicable.—Burroughs Adding Mach. Co. v. Dial, 531.

SCHOOLS AND SCHOOL DISTRICTS.

See Charities, ⚷23, 36, 37, 38; Perpetuities, ⚷4.

SEALED LETTERS.

See Libel and Slander, ⚷25, 41.

SEAMEN.

See Constitutional Law, ⚷307.

⚷4 (U.S.C.C.A.Fla.) Act March 4, 1915, § 4 (Comp. St. § 8322), empowering seamen to collect half their wages at ports of call, and providing section should apply to seamen on foreign vessels while in American harbors, is applicable to British seamen shipped on British vessel in British port, while vessel is in an American harbour.—The Strathearn, 25.

⚷4 (U.S.C.C.A.N.Y.) The offense of desertion in the mercantile marine is not abolished by Seamen's Act, § 4 (Comp. St. § 8322).—The Italier, 662.

⚷15 (U.S.C.C.A.Fla.) Act March 4, 1915, § 4 (Comp. St. § 8322), empowering seamen to collect half their wages in American ports of call, is not invalid as rendering unenforceable in this country a wage contract lawfully made by foreigners in another country.—The Strathearn, 25.

⚷21 (U.S.C.C.A.N.Y.) The offense of desertion in the mercantile marine is not abolished by Seamen's Act, § 4 (Comp. St. § 8322), and such desertion entails a forfeiture of all wages due.—The Italier, 662.

⚷23 (U.S.C.C.A.N.Y.) Advance wages paid seamen on a foreign ship, who signed in a foreign port, where such payment was legal, are to be deducted in computing the half wages due at an intermediate port, under Seamen's Act, § 4 (Comp. St. § 8322).—The Italier, 662.

⚷24 (U.S.C.C.A.Fla.) Act March 4, 1915, § 4 (Comp. St. § 8322), authorizing seamen to collect half their wages at ports of call after voyage commences, provided demand be not made before expiration of five days, etc., authorizes demand two days after calling at port, where over five days had elapsed since commencing voyage.—The Strathearn, 25.

⚷24 (U.S.C.C.A.N.Y.) A demand is essential to the right to half wages at an intermediate port, under Seamen's Act § 4 (Comp. St. § 8322), and such demand must be made while the seaman is still in the ship's service.—The Italier, 662.

As seamen on foreign vessels have no rights under Seamen's Act, § 4 (Comp. St. § 8322), until they arrive within a harbor of the United States, the five-day period which must elapse before demand for half wages may be made thereunder begins to run on the arrival of the ship in such harbor.—Id.

⚷34 (U.S.C.C.A.N.Y.) "Desertion," in the sense of the maritime law, is a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty.—The Italier, 662.

SEDITION.

See Army and Navy, ⚷40; Conspiracy, ⚷27, 28, 43, 45, 48; Criminal Law, ⚷371, 683; Indictment and Information, ⚷87, 125, 140, 150; War, ⚷4.

SELECTIVE SERVICE ACT.

See Army and Navy, ⚷20; Conspiracy, ⚷28, 45, 47; Criminal Law, ⚷97, 371, 406, 450, 723, 814, 822, 1170; Habeas Corpus, ⚷16; Perjury, ⚷9, 19; War, ⚷4.

SELF-PRESERVATION.

See Death, ⚷58.

SET-OFF AND COUNTERCLAIM.

See Evidence, ⚷96.

SEWERS.

See Drains.

SHERIFFS AND CONSTABLES.

See Army and Navy, ⚷20.

SHIPPING.

See Injunction, ⚷108; Maritime Liens, ⚷25; Wharves.

VIII. CARRIAGE OF PASSENGERS.

⚷166(4) (U.S.C.C.A.Hawaii) Evidence *held* to show that the steamship company, into the hold of whose vessel libelant, a passenger, fell, was guilty of negligence, so that libelant was entitled to recover damages for his injuries, despite libelant's testimony adverse to himself; he having been rendered at least temporarily insane by his fall.—The Kinau, 505.

XI. LIMITATION OF OWNER'S LIABILITY.

⚷204 (U.S.C.C.A.Mass.) A temporarily sunken drillboat, used for removing ledges, *held* a "vessel," within Rev. St. §§ 4283–4289 (Comp. St. §§ 8021–8027), limiting the liability of vessel owners for collisions occurring without their privity or knowledge.—Eastern S. S. Corporation v. Great Lakes Dredge & Dock Co., 3.

⚷207 (U.S.C.C.A.Mass.) A dredge company *held* chargeable personally for damages resulting from a collision with its sunken drillboat, where it failed to instruct a watchman to mark the boat in case it sank.—Eastern S. S. Corporation v. Great Lakes Dredge & Dock Co., 3.

⚷208 (U.S.C.C.A.Mass.) The privity or knowledge of a vessel owner's superintendent having general control and direction of its business at Boston *held* the owner's knowledge or privity, within Rev. St. §§ 4283–4289 (Comp. St. §§ 8021–8027), limiting the vessel owner's liability for damages incurred without his privity or knowledge.—Eastern S. S. Corporation v. Great Lakes Dredge & Dock Co., 3.

A dredge company, locating its drillboat on a ledge in a Boston harbor channel, is charged with knowledge that accidents were liable to oc-

cur if it sank and was not marked in a suitable manner, and it was negligent if it failed to man the drillboat with men instructed and reasonably competent to perform the marking.—Id.

⚷209(3) (U.S.C.C.A.Mass.) Evidence that owner of a drillboat was notified of its sinking some three-fourths of an hour before a steamship collided with it, that he was then some three miles from the wreck, etc., does not sustain a finding that he had sufficient opportunity to mark the wreck after receiving news of the sinking and before the collision.—Eastern S. S. Corporation v. Great Lakes Dredge & Dock Co., 3.

Evidence that foreman of a drillboat had some 25 years' experience and knew what should be done in case the boat sank, although he was negligent in failing to mark the wreck, *held* not to show that he was incompetent, or that his employer should reasonably have known that he was.—Id.

Evidence that engineer on a drillboat had never been instructed to mark the boat in case it sank, and did not know this was required, did not establish the owner's personal negligence.—Id.

A vessel owner, seeking to limit its liability for damages resulting from a collision, has the burden of showing that it exercised reasonable care and diligence in manning its boat with competent men.—Id.

SIGNATURES.

See Bills and Notes, ⚷434; Estoppel, ⚷88.

SLANDER.

See Libel and Slander.

SOLDIERS.

See Criminal Law, ⚷37; Intoxicating Liquors, ⚷236; Public Lands, ⚷120.

STATES.

See Constitutional Law, ⚷62; Courts, ⚷335; Navigable Waters, ⚷22.

I. POLITICAL STATUS AND RELATIONS.

⚷9 (U.S.C.C.A.Okl.) Act March 1, 1907, declaring the filing in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, of a lease of an allotment of Indian land, to be constructive notice, especially in view of it being a special act, is not repealed, annulled, or modified by admission of Oklahoma to the Union, by the recordation statutes of the territory or state (Rev. Laws Okl. 1910, §§ 1154, 1155), by the Enabling Act, the Constitution, or the Schedule to the Constitution of that state.—Anchor Oil Co. v. Gray, 361.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⚷188 (U.S.C.C.A.Ark.) When a legislative body selects and uses in a statute words or clauses which had previously acquired by judicial interpretation or common consent and use a well-understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute.—Thorn v. Browne, 469.

⚷208 (U.S.C.C.A.Ill.) If a legislative intent can unmistakably be gathered from title, context, and common knowledge, it is as much a part of the act as if it were written out in the clearest words.—Ross v. Schooley, 374.

⚷211 (U.S.C.C.A.Ill.) If a legislative intent can unmistakably be gathered from title, context, and common knowledge, it is as much a part of the act as if it were written out in the clearest words.—Ross v. Schooley, 374.

⚷221 (U.S.C.C.A.Ill.) If a legislative intent can unmistakably be gathered from title, context, and common knowledge, it is as much a part of the act as if it were written out in the clearest words.—Ross v. Schooley, 374.

⚷225¾ (U.S.C.C.A.Ark.) When a legislative body selects and uses in a statute words or clauses which had previously acquired by judicial interpretation or common consent and use a well-understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute.—Thorn v. Browne, 469.

(B) Particular Classes of Statutes.

⚷241(1) (U.S.C.C.A.Ark.) Courts may not lawfully extend the denunciation of a penal statute to a class of persons excluded from its effect by its plain terms.—Thorn v. Browne, 469.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

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⚷14(4) (U.S.C.C.A.Iowa) Stipulation of facts, in action on accident policy, that the scarf pin used by insured in pricking pimple communicated the infection into the tissues of the lip, *held* properly construed as meaning that the pin itself was infected.—Interstate Business Men's Accident Ass'n v. Lewis, 325.

STREET RAILROADS.

II. REGULATION AND OPERATION.

⚷90(5) (U.S.C.C.A.Ark.) Where automobile attempted to cross street car tracks when car was so near that, though motorman had it under control, he could not stop in time to prevent collision, street car company was not negligent.—West Helena Consol. Co. v. McCray, 99.

⚷114(9) (U.S.C.C.A.Ark.) Evidence *held* not to warrant a finding that motorman was negligent; it appearing that he had his car under full control when an automobile, which had been running parallel to the car tracks, without warning turned across them in front of the car and was struck.—West Helena Consol. Co. v. McCray, 99.

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See Courts, ⚷335; Internal Revenue; Poisons, ⚷2.

III. LIABILITY OF PERSONS AND PROPERTY.

(B) Corporations and Corporate Stock and Property.

⚷168 (U.S.C.C.A.Ariz.) Under Civ. Code Ariz. 1913, par. 4834 et seq., requiring the assessment of all taxable property at its full cash value, the tax commission and board of equalization of Arizona had no authority to ignore the cash value of a foreign oil company's property and to tax its intangible property, fixed with an arbitrary value by capitalizing its earnings or income, by assessing the valuation against the company generally, not upon any specific items of its property, there being no authority for taxation of earnings while "intangible property" includes only franchises, credits, choses in action, and the like. —Standard Oil Co. v. Howe, 485.

V. LEVY AND ASSESSMENT.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

⚷397 (U.S.C.C.A.Ariz.) Civ. Code Ariz. 1913, pars. 4951–4979, providing for the unit rule of value in the taxation of private car lines, railroad property and telegraph and telephone lines, do not authorize the unit rule valuation for taxation of the property of a foreign oil company or for the distribution of the unit value between counties in which the property is situated.—Standard Oil Co. v. Howe, 485.

(G) Review, Correction, or Setting Aside of Assessment.

⚷498 (U.S.C.C.A.Ariz.) Where an oil company, whose "intangible property" was improperly and illegally assessed by the Arizona tax commission and the board of equalization of the state, would become involved in a multiplicity of suits involving a common question of law if it attempted to utilize any remedy under Civ. Code Ariz. 1913, par. 4887, it is entitled to equitable relief by injunction against the tax commission and the board of equalization.—Standard Oil Co. v. Howe, 485.

TENANCY IN COMMON.

See Courts, ⚷310; Patents, ⚷288.

III. RIGHTS AND LIABILITIES OF CO-TENANTS AS TO THIRD PERSONS.

⚷55(3) (U.S.C.C.A.Pa.) Tenants in common must join in actions ex delicto for an injury to their common property, though it be real estate, because the damages belong to them jointly.—Himes v. Schmehl, 281.

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See Action, ⚷62; Bankruptcy, ⚷160, 165, 328, 387, 391; Banks and Banking, ⚷257; Carriers, ⚷94; Conspiracy, ⚷28; Corporations, ⚷218; Courts, ⚷337; Criminal Law, ⚷262, 1038, 1186; Eminent Domain, ⚷148; Estoppel, ⚷93; Exceptions, Bill of, ⚷36; Indictment and Information, ⚷87; Limitation of Actions, ⚷127; Mines and Minerals, ⚷79; Patents, ⚷75; Railroads, ⚷133; Sales, ⚷82, 202, 218½; Seamen, ⚷24; United States, ⚷67; War, ⚷4.

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See Collision; Champerty and Maintenance, ⚷6; Libel and Slander, ⚷25–112; Negligence, ⚷6–136.

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⚷11(6) (U.S.C.C.A.N.Y.) A tug cannot be held liable for injury to her tow by collision, because she tied the tow at the end of a pier, where it was done with the express consent of the owner.—The New York Central No. 18, 445.

TRADE-MARKS AND TRADE-NAMES.

See Attorney and Client, ⚷166; Courts, ⚷292; Evidence, ⚷142, 487, 543, 572.

III. REGISTRATION, REGULATION, AND OFFENSES.

⚷45 (U.S.C.C.A.Ill.) Where a trade-mark for a gum wrapper, consisting of an exhibited design containing the words "Peptomint" and "Gum," was registered with an explicit disclaimer of the words "Peptomint" and "Gum," the statutory right respecting "Peptomint" as one of the elements of the trade-mark was exhausted, the trade-mark statute containing no

provision for reissue or amendment after issue, and the registrant could not thereafter, by subsequent registration, acquire any right respecting the word "Peptomint."—L. P. Larson, Jr., Co. v. Lamont, Corliss & Co., 354.

Where a gum manufacturer's label was marked with the word "Peptomint" wreathed with sprigs of peppermint, and the quoted word was popularly taken as corrupt spelling of peppermint, and so pronounced, the manufacturer, in attempting to assert a common-law right to the quoted word as an independent trade-mark, could not, after disclaimer of such word in the registration of his trade-mark, claim that such word was arbitrarily coined from "peptone."—Id.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(A) What Constitutes Infringement.

⚷59(4) (U.S.C.C.A.Mo.) Plaintiff's trade-mark, consisting of the word "Stark" above the word "Trees," the former in letters successively decreasing in size, the latter in letters successively increasing in size, *held* infringed by defendants' device, different in shape, and bearing a number of words, but having the word "Stark" in the center, in the largest letters, in white on the dark background of a tree; exact similitude not being necessary, but it being enough that an ordinary purchaser is likely to be deceived when they are not placed side by side.—Stark v. Stark Bros. Nurseries & Orchards Co., 221.

Right of one to use his surname as a mark, without infringing a registered trade-mark, is subject to the limitation that it be not used in a manner tending to mislead, and that it be clearly made to appear that the articles sold therewith are his, and not those of the registrant.—Id.

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⚷93(1) (U.S.C.C.A.Ill.) In an action for unfair competition in the use of the word "Peptomint" to simulate plaintiff's word "Pep-O-Mint," that plaintiff's label bore the words "trade-mark registered," while the word "Pep-O-Mint" had not been registered, did not require a dismissal of plaintiff's bill, where such words were attributable to a legend on plaintiff's products that actually had been registered, and in view of the presumption that a suitor's hands are clean.—L. P. Larson, Jr., Co. v. Lamont, Corliss & Co., 354.

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⚷100 (U.S.C.C.A.Ohio) In suit to restrain unfair competition in the sale of sticky fly paper or fly coils, so as to infringe plaintiff's rights, decree approving the trade-name, the name of his commodity, and the designs submitted by defendant under which to continue business, and fixing the amount of bond required as a condition to permit the sale of stock previously manufactured by defendant, *held* sufficient as effectively protecting plaintiff's rights.—O. & W. Thum Co. v. A. K. Ackerman Co., 434.

V. TRADE-MARKS AND TRADE-NAMES ADJUDICATED.

"Pep-O-Mint."—L. P. Larson, Jr., Co. v. Lamont, Corliss & Co., 354.
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See Army and Navy, ⚷40; Conspiracy, ⚷27, 28, 45; Criminal Law, ⚷371, 683; Indictment and Information, ⚷87, 125, 140, 150; War, ⚷4.

TREATIES.

See Aliens, ⚷32.

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See Continuance; Costs; Criminal Law, ⚷673–877; Jury; New Trial.

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VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

⚷139(1) (U.S.C.C.A.Ohio) It was not the province of the trial court to weigh the evidence when passing on motion to direct verdict, but when he came to consider the motion for new trial he was required to weigh evidence.—Lake Erie & W. R. Co. v. Schneider, 625.

(D) Direction of Verdict.

⚷177 (U.S.C.C.A.N.Y.) Motions by both parties for a directed verdict are equivalent to a request for a finding of facts by the court, and both are concluded on the facts so found by direction of a verdict for one of them.—Sampliner v. Motion Picture Patents Co., 202.

⚷178 (U.S.C.C.A.N.D.) It is the practice in the Eighth circuit to regard a general motion or request for a directed verdict, in either a civil or criminal case, as challenging the legal sufficiency of the evidence for a contrary conclusion.—McDowell v. U. S., 382.

VII. INSTRUCTIONS TO JURY.

(D) Applicability to Pleadings and Evidence.

⚷253(4) (U.S.C.C.A.Alaska) In a railroad servant's action for injuries, the road's requested instructions on assumption of risk and contributory negligence *held* properly refused, as not fitting the case, but ignoring an allegation of the complaint.—Alaska Anthracite R. Co. v. Moller, 515.

(G) Construction and Operation.

⚷295(1) (U.S.C.C.A.Tenn.) Instructions must be considered as a whole.—Memphis St. Ry. Co. v. Pierce, 609.

IX. VERDICT.

(A) General Verdict.

⚷343 (U.S.C.C.A.Ohio) Verdict for plaintiff, under instructions that only three issues were to be considered, must be treated as general in form, and as finding all the submitted issues in favor of plaintiff.—Erie R. Co. v. Schleenbaker, 617.

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See Carriers, ⚷57, 58, 94; Warehousemen, ⚷20, 25.

TRUST DEEDS.

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II. PROPERTY, CONTRACTS, AND LIABILITIES.

⚷67(3) (U.S.C.C.A.Iowa) Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), giving persons furnishing labor or materials to a contractor for public work a right of action on the contractor's bond, creates a new liability and gives a special remedy; but the limitation of one year for bringing suit is a condition of the right conferred.—Salyers v. U. S., 339.

⚷67(4) (U.S.C.C.A.Iowa) In an action on behalf of subcontractors on the bond of a contractor for a public building, under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), an allegation that the building was completed and accepted by the United States on a date named is a sufficient allegation of final settlement between the United States and the contractor.—Salyers v. U. S., 339.

IV. CLAIMS AGAINST UNITED STATES.

⚷110 (U.S.C.C.A.N.M.) In the rule of immunity of the government from liability for interest the word "interest" is generally used as meaning compensation for the use or forbearance of money, or damages for its detention.—U. S. v. Rogers, 437.

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See Criminal Law, ⚷304.

VENDOR AND PURCHASER.

See Brokers, ⚷54, 63; Corporations, ⚷228; Equity, ⚷262; Estoppel, ⚷27; Evidence, ⚷342; Lis Pendens, ⚷24; Sales.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

⚷242 (U.S.C.C.A.Tex.) In view of Rev. St. Tex. 1911, art. 6824, requiring registration, but declaring a deed valid, though unrecorded, as to all subsequent purchasers with notice or without valuable consideration, so making it void only as to purchasers for value without notice, a person undertaking to establish the invalidity of a deed has the burden to prove he is within the protected class.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

⚷244 (U.S.C.C.A.Tex.) In suit by receiver of an oil company and a lumber company for the timber on certain land, evidence *held* to justify finding that defendant lumber company was not an innocent purchaser for value.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

VENUE.

See Courts, ⚷276; Criminal Law, ⚷108, 113, 242, 304.

VERDICT.

See Criminal Law, ⚷877; Trial, ⚷343.

WAR.

See Army and Navy, ⚷20, 40; Conspiracy, ⚷27, 28, 34, 43, 45, 47, 48; Criminal Law, ⚷97, 304, 369, 371, 406, 683, 814, 822, 829, 1169, 1170; Habeas Corpus, ⚷16; Indictment and Information, ⚷87, 125, 140, 150; Intoxicating Liquors, ⚷236; Neutrality Laws; Perjury, ⚷9, 19.

⚷4 (U.S.C.C.A.Ariz.) Statements made by defendant, in each case to a single person in the course of a private conversation relating to the war, *held* mere expressions of opinion, not made in violation of section 3 of the Espionage Act.—Sandberg v. U. S., 593.

⚷4 (U.S.C.C.A.Nev.) Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), *held* to denounce three offenses: First, the willful making or conveying of false reports while the United States is at war, with the intent to interfere with the operation or success of military and naval forces, etc.; second, the attempt to cause insubordination, disloyalty, or mutiny in the military and naval forces of the United States; and, third, the willful obstruction of the enlist-

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(D) Applicability to Pleadings and Evidence.

⟹253(4) (U.S.C.C.A.Alaska) In a railroad servant's action for injuries, the road's requested instructions on assumption of risk and contributory negligence *held* properly refused, as not fitting the case, but ignoring an allegation of the complaint.—Alaska Anthracite R. Co. v. Moller, 515.

(G) Construction and Operation.

⟹295(1) (U.S.C.C.A.Tenn.) Instructions must be considered as a whole.—Memphis St. Ry. Co. v. Pierce, 609.

IX. VERDICT.

(A) General Verdict.

⟹343 (U.S.C.C.A.Ohio) Verdict for plaintiff, under instructions that only three issues were to be considered, must be treated as general in form, and as finding all the submitted issues in favor of plaintiff.—Erie R. Co. v. Schleenbaker, 617.

TROVER AND CONVERSION.

See Carriers, ⟹57, 58, 94; Warehousemen, ⟹20, 25.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Bankruptcy, ⟹143; Charities, ⟹18, 20.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names, ⟹53-100.

UNITED STATES.

See Army and Navy; Bankruptcy, ⟹230; Conspiracy, ⟹28; Constitutional Law, ⟹62; Criminal Law, ⟹37, 304, 369, 424, 673, 1169, 1186; Deposits in Court, ⟹11; Eminent Domain, ⟹148; Navigable Waters, ⟹1, 22; Principal and Surety, ⟹185; Railroads, ⟹5½; Waters and Water Courses, ⟹33.

II. PROPERTY, CONTRACTS, AND LIABILITIES.

⟹67(3) (U.S.C.C.A.Iowa) Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), giving persons furnishing labor or materials to a contractor for public work a right of action on the contractor's bond, creates a new liability and gives a special remedy; but the limitation of one year for bringing suit is a condition of the right conferred.—Salyers v. U. S., 339.

⟹67(4) (U.S.C.C.A.Iowa) In an action on behalf of subcontractors on the bond of a contractor for a public building, under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), an allegation that the building was completed and accepted by the United States on a date named is a sufficient allegation of final settlement between the United States and the contractor.—Salyers v. U. S., 339.

IV. CLAIMS AGAINST UNITED STATES.

⟹110 (U.S.C.C.A.N.M.) In the rule of immunity of the government from liability for interest the word "interest" is generally used as meaning compensation for the use or forbearance of money, or damages for its detention.—U. S. v. Rogers, 437.

UNITED STATES PHARMACOPŒIA.

See Criminal Law, ⟹304.

VENDOR AND PURCHASER.

See Brokers, ⟹54, 63; Corporations, ⟹228; Equity, ⟹262; Estoppel, ⟹27; Evidence, ⟹342; Lis Pendens, ⟹24; Sales.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

⟹242 (U.S.C.C.A.Tex.) In view of Rev. St. Tex. 1911, art. 6824, requiring registration, but declaring a deed valid, though unrecorded, as to all subsequent purchasers with notice or without valuable consideration, so making it void only as to purchasers for value without notice, a person undertaking to establish the invalidity of a deed has the burden to prove he is within the protected class.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

⟹244 (U.S.C.C.A.Tex.) In suit by receiver of an oil company and a lumber company for the timber on certain land, evidence *held* to justify finding that defendant lumber company was not an innocent purchaser for value.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

VENUE.

See Courts, ⟹276; Criminal Law, ⟹108, 113, 242, 304.

VERDICT.

See Criminal Law, ⟹877; Trial, ⟹343.

WAR.

See Army and Navy, ⟹20, 40; Conspiracy, ⟹27, 28, 34, 43, 45, 47, 48; Criminal Law, ⟹97, 304, 369, 371, 406, 683, 814, 822, 829, 1169, 1170; Habeas Corpus, ⟹16; Indictment and Information, ⟹87, 125, 140, 150; Intoxicating Liquors, ⟹236; Neutrality Laws; Perjury, ⟹9, 19.

⟹4 (U.S.C.C.A.Ariz.) Statements made by defendant, in each case to a single person in the course of a private conversation relating to the war, *held* mere expressions of opinion, not made in violation of section 3 of the Espionage Act.—Sandberg v. U. S., 593.

⟹4 (U.S.C.C.A.Nev.) Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), *held* to denounce three offenses: First, the willful making or conveying of false reports while the United States is at war, with the intent to interfere with the operation or success of military and naval forces, etc.; second, the attempt to cause insubordination, disloyalty, or mutiny in the military and naval forces of the United States; and, third, the willful obstruction of the enlist-

rant submission of the case to the jury.—Nokis v. U. S., 453.

PUBLIC LANDS.

See Constitutional Law, ⚷46; Drains, ⚷49; Ejectment, ⚷109; Estoppel, ⚷27, 47; Evidence, ⚷342; Indictment and Information, ⚷108; Mines and Minerals, ⚷42; Perjury, ⚷36.

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PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads.

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See Equity, ⚷262.

RAILROADS.

See Appeal and Error, ⚷1064; Carriers; Continuance, ⚷26; Courts, ⚷297; Death, ⚷58; Master and Servant, ⚷111, 204, 228, 240, 278, 285; Pleading, ⚷218; Street Railroads; Trial, ⚷253.

I. CONTROL AND REGULATION IN GENERAL.

⚷5½ [New, vol. 6A Key-No. Series] (U.S.C.C.A.Canal Zone) Since Act June 25, 1910, Act Aug. 24, 1912, § 6 (Comp. St. § 10042), and other statutes and regulations and rulings, indicate an intention to preserve the corporate existence of the Panama Railroad Company, though the government owns all its stock, that corporation may be sued by a private individual for injuries caused by the negligence of its employés.—Panama R. Co. v. Curran, 114.

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⚷133 (1) (U.S.C.C.A.Neb.) In a lease of land by a railroad company to a smelting company as site for a plant, reserving to lessor all tracks thereon, a provision by which lessor agreed to furnish material and lay all further tracks required by lessee, "and do all switching of its cars within its premises necessary in placing the same for loading and unloading freight or material therefor free of charge to said smelting company," *held* not to limit such free switching service to that of cars for actual load hauls from or to the plant, especially in view of a contrary practical construction by the parties during 30 years.—American Smelting & Refining Co. v. Union Pac. R. Co., 83.

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⚷281(1) (U.S.C.C.A.Canal Zone) Under the Panama laws, a railroad is liable for personal injuries caused by negligence of its employés.—Panama R. Co. v. Pigott, 183.

(F) Accidents at Crossings.

⚷300 (U.S.C.C.A.Ohio) Though a pathway across a railroad's track to a picnic ground was a private way, where the public was licensed to use it in crossing the tracks, a duty arose on the railroad to exercise reasonable care to avoid injury to those whose presence there reasonably might be anticipated.—Hodges v. Erie R. Co., 498.

⚷327(7) (U.S.C.C.A.Ohio) The owner and driver of a motor truck along a good road, so that the truck was not noisy, in approaching a single-track railroad crossing, was not required as a matter of law to stop to avoid the implication of negligence contributing to his injuries, when struck by a special train running at an unusual time; the view not being so obstructed as to require plaintiff to stop.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷344(3) (U.S.C.C.A.Ohio) Petition against a railroad for death of a mother, who crawled under a freight train standing on a track where it blocked a pathway to picnic grounds, in an attempt to rescue her three-year old son, who had crawled under the train before her, *held* not to state a case of actionable negligence on the railroad's part.—Hodges v. Erie R. Co., 498.

⚷346(2) (U.S.C.C.A.Ohio) In the federal courts, the burden to prove the defense of contributory negligence rests upon defendant in a suit for injuries at a crossing.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷350(1) (U.S.C.C.A.Ohio) In an action against a railroad for a death on its track at a crossing, withdrawal from the jury of the question of the railroad's negligence *held* erroneous, in view of the testimony.—Robbins v. Pennsylvania Co., 621.

⚷350(1) (U.S.C.C.A.Ohio) In an action against a railroad for injuries to a motor truck owner and driver at a crossing, questions of the railroad's negligence and its effect in producing the accident *held* for the jury.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷350(13) (U.S.C.C.A.Ohio) In an action against a railroad for a death on its track, question of decedent's contributory negligence *held* for the jury.—Robbins v. Pennsylvania Co., 621.

⚷350(13) (U.S.C.C.A.Ohio) In an action against a railroad for injuries at a crossing to the owner and driver of a motor truck, question of plaintiff's contributory negligence *held*

for the jury.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷350(14) (U.S.C.C.A.Ohio) A three year old child is not as a matter of law guilty of negligence in passing under a standing freight train, blocking the pathway to picnic grounds much used by children.—Hodges v. Erie R. Co., 498.

⚷350(31) (U.S.C.C.A.Ohio) It is not negligence per se for a mother voluntarily to risk her own life in attempting to rescue her child, who had crawled under a standing freight train blocking a path to picnic grounds.—Hodges v. Erie R. Co., 498.

REAL ACTIONS.

See Ejectment; Partition.

RECEIVERS.

See Lis Pendens, ⚷24; Property, ⚷9; Vendor and Purchaser, ⚷244.

VI. ACTIONS.

⚷178 (U.S.C.C.A.Tex.) Lumber company *held* not a necessary party to suit ancillary to receivership proceedings by receiver of oil company against a second lumber company for the timber on certain land as to which the first lumber company had a stumpage contract, which did not place ownership of the timber in it.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

VII. ACCOUNTING AND COMPENSATION.

⚷204 (U.S.C.C.A.Tex.) Decree discharging receivers of lumber company and an oil company, and turning their properties over to the companies under recited terms, did not destroy the jurisdiction of the court, which had previously attached, over an ancillary suit by the receiver of the oil company against a second lumber company, which had been made a party to the receivership suit by an amended bill.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

RECORDS.

See Appeal and Error, ⚷684–709, 758; Bankruptcy, ⚷188; Courts, ⚷292; Criminal Law, ⚷1090; Evidence, ⚷332, 342; Habeas Corpus, ⚷25; Poisons, ⚷2; Vendor and Purchaser, ⚷242.

RED CROSS.

See Criminal Law, ⚷683.

REFERENCE.

See Bankruptcy, ⚷223, 224, 230, 415, 467.

REFORMATION OF INSTRUMENTS.

See Action, ⚷68; Insurance, ⚷143.

I. RIGHT OF ACTION AND DEFENSES.

⚷16 (U.S.C.C.A.Okl.) Where both parties to a deed believed that the grantor owned only a one-half interest in the land, and the grantee informed the grantor, who could not read English, that the deed conveyed only a one-half interest, the grantor is entitled to relief against the deed, which in terms conveyed the entire interest in the land.—Barnett v. Kunkle, 38.

⚷17(1) (U.S.C.C.A.Okl.) A mutual mistake as to the interest of the grantor in the land is a mistake of fact, not of law, though induced by a mistaken view of the law.—Barnett v. Kunkle, 38.

⚷20 (U.S.C.C.A.Okl.) Where an Indian, who could not read English, mistakenly believed that he had only a one-half interest in the land conveyed, and was confirmed in that belief by statements of the grantee, equity will grant relief to the grantor from a deed conveying the entire estate.—Barnett v. Kunkle, 38.

II. PROCEEDINGS AND RELIEF.

⚷30 (U.S.C.C.A.Mich.) If the agent of a burglary insurer and the insured storekeeper or his agent so misunderstood each other that their minds never met as regards the extent of the store's burglary alarm equipment, or if agent of insurer through mistake or designedly misinformed insurer as to extent of such equipment, or undertook without authority to waive failure of the storekeeper to connect his safe with a burglary alarm system, correction of the policy as issued cannot be obtained at law, but must be sought in equity, after which the actual contract as then determined can be enforced.—Prudential Casualty Co. v. Miller, 458.

RELATION BACK.

See Indians, ⚷16.

RELEASE.

See Bankruptcy, ⚷165; Courts, ⚷264; Mortgages, ⚷25.

REPORTS.

See Corporations, ⚷640; Pleading, ⚷34.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error.

RIOT.

See Criminal Law, ⚷814.

RISKS.

See Master and Servant, ⚷204.

RULES OF COURT.

See Court Rules Cited.

SAFETY APPLIANCE ACT.

See Commerce, ⚷8, 27; Master and Servant, ⚷111, 204, 228.

SALES.

See Bankruptcy, ⚷165, 340; Banks and Banking, ⚷253; Brokers, ⚷85; Carriers, ⚷25, 58, 71; Champerty and Maintenance, ⚷6; Conspiracy, ⚷48; Contracts, ⚷

subscribed and took the affidavit.—Whiteside v. U. S., 513.

⚷36 (U.S.C.C.A.Alaska) In a prosecution for making false affidavits as to annual assessment work on a placer claim, in violation of the Alaska law, *held* that, while the evidence for the prosecution, standing alone, would be insufficient to sustain a conviction, yet, in connection with discrepancies of defendant's own testimony, denial of his motion for instructed verdict was proper.—Vedin v. U. S., 534.

PERPETUITIES.

See Charities, ⚷38.

⚷4(4) (U.S.C.C.A.Ill.) Mere request, in will making devise for support of a school in a city, that the city keep testator's family burial lot in repair, imposes no obligation, much less creates a perpetuity, and so does not affect validity of charitable gift.—Laswell v. Hungate, 29.

PHYSICIANS AND SURGEONS.

See Conspiracy, ⚷48; Criminal Law, ⚷371, 472; Insurance, ⚷453, 455; Poisons, ⚷4, 9.

PLEADING.

See Courts, ⚷276, 405; Equity, ⚷262; Estoppel, ⚷3; Evidence, ⚷272; Limitation of Actions, ⚷127, 180.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

⚷34(3) (U.S.C.C.A.Ill.) Assuming that Rev. Codes Mont. § 3850, making directors of a corporation liable for debts of the corporation if they do not file certain reports, applies to foreign corporations, in a proceeding against directors of a foreign corporation for not filing such reports in Montana, it must be specifically alleged that the debt was incurred in Montana, inasmuch as a judgment rendered in Montana on a debt raises no presumption that the debt was there incurred.—Stark Bros.' Nurseries & Orchards Co. v. Little, 461.

V. DEMURRER OR EXCEPTION.

⚷218(4) (U.S.C.C.A.Ohio) Dismissal of action against railroad for a death on its track, on sustension of its demurrer to plaintiff's petition, *held* erroneous; it not being clear that a good cause of action could not be stated by amendment.—Hodges v. Erie R. Co., 498.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⚷236(5) (U.S.C.C.A.Iowa) Allowance of an amendment during trial, to conform the pleadings to the proof, is discretionary with the trial court.—Salyers v. U. S., 339.

⚷248(4) (U.S.C.C.A.Iowa) Where plaintiff in the original petition on contractor's bond set up a claim for material furnished by him to a contractor, an amendment setting up a further claim for material furnished by another and assigned to him states a new and separate cause of action, although the amount prayed for in the original petition was large enough to cover both claims.—Salyers v. U. S., 339.

PLEDGES.

See Warehousemen, ⚷15.

POISONS.

See Conspiracy, ⚷48; Criminal Law, ⚷371, 472, 1177, 1186; Indictment and Information, ⚷110, 111; Insurance, ⚷530.

⚷2 (U.S.C.C.A.Mich.) The administrative provisions of Harrison Narcotic Drug Act, § 1 (Comp. St. § 6287g), relating to taxation and registration, are valid.—Stetson v. U. S., 639.

⚷4 (U.S.C.C.A.Mich.) "Preparations and remedies," contained in Harrison Narcotic Drug Act, § 6 (Comp. St. § 6287*l*), *held* not to include clear morphine, but to relate to actual medicinal preparations and remedies not containing more than a quarter of a grain of morphine, remedies such as a physician or druggist would normally dispense.—Stetson v. U. S., 639.

Harrison Narcotic Drug Act, § 8 (Comp. St. § 6287n), applies to the business of selling narcotic drugs as distinct from mere possession.—Id.

⚷9 (U.S.C.C.A.Mich.) In a prosecution for violation of the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), defendant not being charged as a physician or a druggist, and the indictment not negativing the exception of section 6 of the act (Comp. St. § 6287*l*), it was open to him to show he was merely dispensing medicinal preparations and remedies containing not more than the amount of morphine permitted by section 6.—Stetson v. U. S., 639.

⚷9 (U.S.C.C.A.Tex.) An indictment charging violation of the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), which averred that defendant at the time of the offense knew that cocaine was a derivative of coca leaves, and that morphine and heroin were salts and derivatives of opium, sufficiently averred by implication the fact that cocaine was a derivative of such leaves, and that morphine and heroin are salts or derivatives of opium.—Melanson v. U. S., 129.

In prosecutions for violating and conspiracy to violate the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), evidence in one case *held* sufficient to show the drugs, cocaine, morphine, and heroin, are salts and certainly derivatives of coca leaves or opium, and, in the second case, sufficient to authorize submission of the issue to the jury.—Id.

In prosecution of physicians for sale of drugs in violation of Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), whether dispensing of drug in each case was a dispensing of it by a physician to a patient, in which case no order form was required, or whether the form of prescription was used by defendants as an evasion of the law, and not in good faith, in which case the dispensing would be a sale, and an order form necessary to bring it within the law, *held* for the jury.—Id.

In prosecution of physicians for having violated the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), whether two persons were consumers of the drug and not patients of defend-

ants, and whether defendants and the druggists on whom they issued prescriptions, their co-defendants, knew the true character in which such persons sought to procure drugs, *held* for the jury.—Id.

In prosecution of physicians for having violated and conspired to violate the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), the trial court in his general charge properly submitted an issue as to the good faith of defendants in issuing their prescriptions to supposed patients, since the defendants could only protect themselves if the prescriptions were issued legitimately in their practice.—Id.

POST OFFICE.

See Bribery, ⚷11; Conspiracy, ⚷47; Criminal Law, ⚷1170½.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRESCRIPTION.

See Limitation of Actions.

PRESIDENT.

See Criminal Law, ⚷369.

PRICE.

See Injunction, ⚷34.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Carriers, ⚷71; Criminal Law, ⚷406; Patents, ⚷288; Reformation of Instruments, ⚷30.

PRINCIPAL AND SURETY.

See Bankruptcy, ⚷230; Drains, ⚷49; Guaranty; Witnesses, ⚷244, 255.

III. DISCHARGE OF SURETY.

⚷123(1) (U.S.C.C.A.Miss.) The contract requirement of exertion by contractor of all reasonable diligence and activity being for the benefit of the obligee on the contractor's bond, the obligee, by failing to treat a less amount of diligence as a default, waived it, and was not required to give the surety notice thereof; it not being in such case a "default" within the meaning of the contract.—Equitable Surety Co. v. Board of Com'rs of Muddy Bottom Swamp Land Dist. No. 1, Tippah County, Miss, 119.

IV. REMEDIES OF CREDITORS.

⚷145(1) (U.S.C.C.A.Miss.) In action on surety's bond, judgment against principal for breach of contract is admissible as prima facie evidence of principal's default, even against surety.—Equitable Surety Co. v. Board of Com'rs of Muddy Bottom Swamp Land Dist. No. 1, Tippah County, Miss., 119.

⚷151 (U.S.C.C.A.Miss.) Ordinarily obligee on bond is proper party to enforce it.—Equitable Surety Co. v. Board of Com'rs of Muddy Bottom Swamp Land Dist. No. 1, Tippah County, Miss., 119.

Surety, receiving a premium, is estopped to deny obligee's capacity to sue for breach of bond.—Id.

⚷162(2) (U.S.C.C.A.Miss.) In action on surety's bond, evidence that surety's manager construed contract as authorizing payment of disputed item to contractor, etc., *held* to make a jury question whether such payment was authorized by contract.—Equitable Surety Co. v. Board of Com'rs of Muddy Bottom Swamp Land Dist. No. 1, Tippah County, Miss., 119.

In action on surety's bond, evidence that consideration named in drainage contract was subject to discount under another contract, etc., made a jury question whether plaintiff made a material false representation to defendant surety that contractor would receive amount stated in original contract.—Id.

In action on a surety's bond, conflicting evidence *held* to make jury question whether plaintiff falsely represented to defendant surety that bond was to cover additional work, for which contractor would receive additional pay.—Id.

V. RIGHTS AND REMEDIES OF SURETY.

(B) As to Principal.

⚷185 (U.S.C.C.A.Va.) The right of a surety on a bail bond to recover out of an indemnity fund provided by the principal his reasonable expenses in defending a suit on the bond does not extend to costs and fees expended in defending against a supplementary proceeding by the government to collect the judgment.—Leary v. U. S., 330.

A deposit of securities to indemnify the surety on a bail bond carries an implied warranty of title, but not that the title will not be questioned, and the surety is not entitled to charge the fund with the expense of successful litigation in defending his title as against his adversary, which was adjudged owner of the securities subject to his claim, whether the litigation is conducted by himself or the depositary.—Id.

PROCESS.

See Appeal and Error, ⚷397; Appearance, ⚷20.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

⚷9 (U.S.C.C.A.Tex.) In suit by receiver of an oil company and a lumber company against another lumber company for the timber on certain lands, evidence *held* sufficient to authorize finding that title at the time of institution of the suit was in plaintiff lumber company and the oil company.—Keith Lumber Co. v. Hous-Oil Co. of Texas, 213.

PROSTITUTION.

See Aliens, ⚷54.

⚷5 (U.S.C.C.A.Iowa) Evidence in a prosecution for violation of the White Slave Traffic Act (Comp. St. § 8812) *held* sufficient to war-

rant submission of the case to the jury.—Nokis v. U. S., 453.

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⚷300 (U.S.C.C.A.Ohio) Though a pathway across a railroad's track to a picnic ground was a private way, where the public was licensed to use it in crossing the tracks, a duty arose on the railroad to exercise reasonable care to avoid injury to those whose presence there reasonably might be anticipated.—Hodges v. Erie R. Co., 498.

⚷327(7) (U.S.C.C.A.Ohio) The owner and driver of a motor truck along a good road, so that the truck was not noisy, in approaching a single-track railroad crossing, was not required as a matter of law to stop to avoid the implication of negligence contributing to his injuries, when struck by a special train running at an unusual time; the view not being so obstructed as to require plaintiff to stop.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷344(3) (U.S.C.C.A.Ohio) Petition against a railroad for death of a mother, who crawled under a freight train standing on a track where it blocked a pathway to picnic grounds, in an attempt to rescue her three-year old son, who had crawled under the train before her, *held* not to state a case of actionable negligence on the railroad's part.—Hodges v. Erie R. Co., 498.

⚷346(2) (U.S.C.C.A.Ohio) In the federal courts, the burden to prove the defense of contributory negligence rests upon defendant in a suit for injuries at a crossing.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷350(1) (U.S.C.C.A.Ohio) In an action against a railroad for a death on its track at a crossing, withdrawal from the jury of the question of the railroad's negligence *held* erroneous, in view of the testimony.—Robbins v. Pennsylvania Co., 621.

⚷350(1) (U.S.C.C.A.Ohio) In an action against a railroad for injuries to a motor truck owner and driver at a crossing, questions of the railroad's negligence and its effect in producing the accident *held* for the jury.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷350(13) (U.S.C.C.A.Ohio) In an action against a railroad for a death on its track, question of decedent's contributory negligence *held* for the jury.—Robbins v. Pennsylvania Co., 621.

⚷350(13) (U.S.C.C.A.Ohio) In an action against a railroad for injuries at a crossing to the owner and driver of a motor truck, question of plaintiff's contributory negligence *held*

for the jury.—Lake Erie & W. R. Co. v. Schneider, 625.

⚷350(14) (U.S.C.C.A.Ohio) A three year old child is not as a matter of law guilty of negligence in passing under a standing freight train, blocking the pathway to picnic grounds much used by children.—Hodges v. Erie R. Co., 498.

⚷350(31) (U.S.C.C.A.Ohio) It is not negligence per se for a mother voluntarily to risk her own life in attempting to rescue her child, who had crawled under a standing freight train blocking a path to picnic grounds.—Hodges v. Erie R. Co., 498.

REAL ACTIONS.

See Ejectment; Partition.

RECEIVERS.

See Lis Pendens, ⚷24; Property, ⚷9; Vendor and Purchaser, ⚷244.

VI. ACTIONS.

⚷178 (U.S.C.C.A.Tex.) Lumber company *held* not a necessary party to suit ancillary to receivership proceedings by receiver of oil company against a second lumber company for the timber on certain land as to which the first lumber company had a stumpage contract, which did not place ownership of the timber in it.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

VII. ACCOUNTING AND COMPENSATION.

⚷204 (U.S.C.C.A.Tex.) Decree discharging receivers of lumber company and an oil company, and turning their properties over to the companies under recited terms, did not destroy the jurisdiction of the court, which had previously attached, over an ancillary suit by the receiver of the oil company against a second lumber company, which had been made a party to the receivership suit by an amended bill.—Keith Lumber Co. v. Houston Oil Co. of Texas, 213.

RECORDS.

See Appeal and Error, ⚷684–709, 758; Bankruptcy, ⚷188; Courts, ⚷292; Criminal Law, ⚷1090; Evidence, ⚷332, 342; Habeas Corpus, ⚷25; Poisons, ⚷2; Vendor and Purchaser, ⚷242.

RED CROSS.

See Criminal Law, ⚷683.

REFERENCE.

See Bankruptcy, ⚷223, 224, 230, 415, 467.

REFORMATION OF INSTRUMENTS.

See Action, ⚷68; Insurance, ⚷143.

I. RIGHT OF ACTION AND DEFENSES.

⚷16 (U.S.C.C.A.Okl.) Where both parties to a deed believed that the grantor owned only a one-half interest in the land, and the grantee informed the grantor, who could not read English, that the deed conveyed only a one-half interest, the grantor is entitled to relief against the deed, which in terms conveyed the entire interest in the land.—Barnett v. Kunkle, 38.

⚷17(1) (U.S.C.C.A.Okl.) A mutual mistake as to the interest of the grantor in the land is a mistake of fact, not of law, though induced by a mistaken view of the law.—Barnett v. Kunkle, 38.

⚷20 (U.S.C.C.A.Okl.) Where an Indian, who could not read English, mistakenly believed that he had only a one-half interest in the land conveyed, and was confirmed in that belief by statements of the grantee, equity will grant relief to the grantor from a deed conveying the entire estate.—Barnett v. Kunkle, 38.

II. PROCEEDINGS AND RELIEF.

⚷30 (U.S.C.C.A.Mich.) If the agent of a burglary insurer and the insured storekeeper or his agent so misunderstood each other that their minds never met as regards the extent of the store's burglary alarm equipment, or if agent of insurer through mistake or designedly misinformed insurer as to extent of such equipment, or undertook without authority to waive failure of the storekeeper to connect his safe with a burglary alarm system, correction of the policy as issued cannot be obtained at law, but must be sought in equity, after which the actual contract as then determined can be enforced.—Prudential Casualty Co. v. Miller, 458.

RELATION BACK.

See Indians, ⚷16.

RELEASE.

See Bankruptcy, ⚷165; Courts, ⚷264; Mortgages, ⚷25.

REPORTS.

See Corporations, ⚷640; Pleading, ⚷34.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error.

RIOT.

See Criminal Law, ⚷814.

RISKS.

See Master and Servant, ⚷204.

RULES OF COURT.

See Court Rules Cited.

SAFETY APPLIANCE ACT.

See Commerce, ⚷8, 27; Master and Servant, ⚷111, 204, 228.

SALES.

See Bankruptcy, ⚷165, 340; Banks and Banking, ⚷253; Brokers, ⚷85; Carriers, ⚷25, 58, 71; Champerty and Maintenance, ⚷6; Conspiracy, ⚷48; Contracts, ⚷

116; Corporations, ⚷376, 542; Estoppel, ⚷68, 72; Evidence, ⚷69; Frauds, Statute of, ⚷115, 116; Injunction, ⚷34; Patents, ⚷288; Payment, ⚷22; Poisons, ⚷4, 9; Trade-Marks and Trade-Names, ⚷100; Vendor and Purchaser.

II. CONSTRUCTION OF CONTRACT.

⚷54 (U.S.C.C.A.Cal.) As a rule, the parties to mercantile agreements, as contracts of sale between dealers, are held to have intended to make time the essence of the contract.—Ackerman v. Santa Rosa-Vallejo Tanning Co., 409.

⚷54 (U.S.C.C.A.La.) A company which sold lumber to a railroad, contracting to supply it "f. o. b." its rails, had the right to accept and act on a practical construction of the contracts as to the meaning of the letters by the railroad. —Brooks-Scanlon Co. v. Illinois Cent. R. Co., 319.

⚷79 (U.S.C.C.A.La.) Where the application of the facts to the expression "f. o. b.," used in a contract of sale, was a matter of doubt and controversy, it was a proper subject for an understanding between the parties, and, such an understanding having been reached, it was not in conflict with the effect of the letters, but merely defined the application of the expression.—Brooks-Scanlon Co. v. Illinois Cent. R. Co., 319.

Where a company, which sold lumber to a railroad "f. o. b." its rails, made its prices with reference to the railroad's practical construction of the contract, in relation to such letters, by payment of the lumber company's bill without deduction of payments made by a division of the railroad, and such construction was followed thereafter, the railroad cannot recover back part of the payments made on the ground that the construction was erroneous. —Id.

⚷82(1) (U.S.C.C.A.Cal.) A contract for the sale of leather backs, reading, as to payment, "2%—30 days f. o. b. Vallejo," required payment within 30 days of the date of shipment from the seller's tannery, and, if paid sooner, called for a deduction of 2 per cent.—Ackerman v. Santa Rosa-Vallejo Tanning Co., 409.

⚷87(3) (U.S.C.C.A.La.) Evidence *held* to warrant jury in finding that letters "f. o. b." were accepted by both parties as referring alone to charges connected with handling and loading the sold lumber at shipping point, and as not having reference to charges conditional in character and the existence of which resulted from the subsequent action of the buyer railroad.—Brooks-Scanlon Co. v. Illinois Cent. R. Co., 319.

⚷88 (U.S.C.C.A.La.) In a railroad's action to recover from the seller an excess, paid under a contract whereby lumber was purchased "f. o. b." its rails, issue as to the understanding of the parties regarding the meaning of the expression "f. o. b." *held* for the jury under the evidence.—Brooks-Scanlon Co. v. Illinois Cent. R. Co., 319.

In an action by a railroad to recover from a lumber company alleged overpayments on purchases of lumber, issue of estoppel of the railroad to claim any overpayment, on the ground that it had practically construed the contracts between the parties, *held* to be submitted to the jury for determination.—Id.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

⚷174 (U.S.C.C.A.Cal.) Where the seller of leather backs shipped an installment in accordance wtih the contract, and three days after payment for the installment was due the buyers announced their intention to continue to hold back payment until the order was completed, the seller had a right to stand on the terms of the contract and refuse performance until the buyers themselves performed, and the latter, having failed to comply with the terms of payment, cannot insist the seller should have proceeded and completed the contract in the manner specified.—Ackerman v. Santa Rosa-Vallejo Tanning Co., 409.

⚷179(4) (U.S.C.C.A.Cal.) Delayed acceptance by the buyers of goods once rejected was a waiver of defects and of contract requirements as to quality of the merchandise.—Ackerman v. Santa Rosa-Vallejo Tanning Co., 409.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

⚷202(8) (U.S.C.C.A.N.Y.) An apparently unrestricted delivery of goods sold for cash presumably waives the condition that payment is necessary to pass title.—In re Perpall, 104.

The seller of a bond did not waive payment as a condition precedent to passing title, where his messenger delivered the bond to a broker and another messenger according to the usual business custom, called to receive payment a few hours later, after allowing time for the broker to make entries, execute a check, etc. —Id.

⚷218½ (U.S.C.C.A.N.Y.) Evidence that the seller's messenger delivered a bond to a broker, and that another messenger called for the purchase price within a few hours after giving the broker time to make the check according to the usual business custom, *held* to sustain a finding that title did not pass until payment.—In re Perpall, 104.

Whether the condition that payment is required to pass title to goods sold has been waived is a jury question, especially where the rights of third parties have not intervened.—Id.

IX. CONDITIONAL SALES.

⚷464 (U.S.C.C.A.Ohio) Gen. Code Ohio, § 8570, imposes a limitation only on the right of a conditional seller to retake the property on default, and was not intended to vitiate the contract, but merely to protect the purchaser.—Burroughs Adding Mach. Co. v. Dial, 531.

Conditional sale contracts are valid at common law, and, in the absence of an Ohio statute declaring such contracts, made in the state, illegal, or declaring it an offense either to make or attempt to enforce such conditional contracts, except under circumstances not existing in the present case, the Circuit Court of Appeals cannot hold that such an Ohio contract is illegal. —Id.

⚷484 (U.S.C.C.A.Ohio) Where it does not appear that on attempting to retake possession of property conditionally sold, or otherwise, the seller had violated Gen. Code Ohio, § 8570, nor any law of Ohio, section 12464, providing that a seller who violates any of the provisions of